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Supreme Court of the United States

OCTOBER TERM, 1961

No. 213

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE, Trustee for ROBERT A. GILCHRIST, a minor, Partners, d/b/a GILCHRIST & SONS; and G & R COAL CO., INC.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

SNYDER AND RANDOLPH, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SNYDER AND RANDOLPH, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America,[1] prays that a writ of certiorari issue to review the judgment

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[1] Herein referred to as UMW, or Petitioner.

of the United States Court of Appeals for the Sixth Circuit[2] entered May 1, 1961, in Case No. 14,379, styled William G. Gilchrist, Jr., William G. Gilchrist, III, and James Blythe, Trustee for Robert A. Gilchrist, a minor, Partners d b/a Gilchrist & Sons,[3] and G & R Coal Co., Inc.,[4] v. United Mine Workers of America, and Case No. 14,380, styled Snyder and Randolph, Inc.[5] v. United Mine Workers of America, wherein the Sixth Circuit affirmed a judgment entered by the United States District Court for the Eastern District of Tennessee, Northern Division,[6] in favor of plaintiffs in the total amount of four hundred seventy-nine thousand ($479,000) dollars.

A certified joint appendix, together with the proceedings in the Sixth Circuit, is furnished herewith.

OPINIONS BELOW

The Sixth Circuit's opinion appears in the Appendix hereto[7] at pages 1a et seq., and is reported in F. 2d .

The District Court's memorandum, not officially reported, appears in the certified joint appendix at pages 54 to 133.

JURISDICTION

The jurisdiction of this Court is conferred under 28 U.S.C. Secs. 1254(1) and 2101(e). The judgment of the Sixth Circuit was entered May 1, 1961.

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[2] Herein referred to as Sixth Circuit.

[3] Herein referred to as Gilchrist & Sons, or the partnership.

[4] Herein referred to as G & R

[5] Herein referred to as S & R.

[6] Herein referred to as District Court.

[7] The abbreviation "A" refers to the Appendix to this Petition.

QUESTIONS PRESENTED

1. Where a union sought collective bargaining agreements with two coal-producing companies whose coal was hauled by independent trucking contractors from their respective mines to a common tipple operated by one of the producing companies, and where a non-producing company furnished mining equipment, mining sites and the tipple to one of the companies and sold all coal processed and loaded at the tipple, does picketing at the tipple entrance and the entrance of the mine of the producing company which operated the tipple (no picketing occurred at the mine of the other producing company) constitute a violation of Section 303 of the Labor-Management Relations Act, 1947[*] as to both the producing companies and non-producing company?

2. May a partnership, though not an employer of employees primarily or secondarily involved in a labor dispute, assert an action based upon a secondary boycott violative of the Act's Section 303(b) on the theory that its business was integrated with that of a primary employer and that it was damaged in the dispute?

3. In an action against a labor union for damages claimed to have resulted from a labor dispute under Section 303 of the Act wherein plaintiffs contended that certain actions which occurred during the dispute constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute constituted unlawful interference with plaintiffs' businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal cause of action?

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[*] Herein referred to as the Act.

4. Where properties owned or used by mining concerns were clandestinely damaged by dynamite explosions at a time a labor union was seeking to represent the employees of such concerns; and where no evidence was introduced establishing participation in or authorization or ratification by union agents or members; and where union representatives denied individual or union involvement therein; and where the District Court expressly concluded that the wrongful "acts of others not authorized by (the union) may have contributed to the result," may the union nevertheless be held liable therefor on the theory that the union had "created among its members a spirit of lawlessness and animosity toward" the mining concerns?

STATUTE INVOLVED

The statutory provision involved is Section 303, Labor-Management Relations Act, 1947 [29 U.S.C. 187, 61 Stat. 158(a)(1) and (2)][9] set forth in the Appendix hereto at page 7a.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction in the District Court

The basis for Federal jurisdiction in the District Court of the original complaint was Sec. 303 of the Labor-Management Relations Act, 1947 (29 U.S.C.A. Sec. 187). District Court also asserted ancillary jurisdiction of an alleged violation of the common law of Tennessee and Kentucky.

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[9] This reference is to Section 303 of the Labor-Management Relations Act, 1947 prior to amendment thereof by Section 704(e) of the Labor-Management Reporting and Disclosure Act of 1959 (Pub. L. 87-257, Title VII, Sec. 704(e), 73 Stat. 545, 29 USC Sec. 187. All references to "Section 303 of the Act" are to the Act prior to the 1959 amendment. The amendment does not alter the questions involved.

2. Kind of Action and the Judgment

Gilchrist and Sons and G & R, by complaint, and S & R, by separate complaint, charged that UMW had violated the Act's Section 303 and that UMW by various means in furtherance of the alleged violation of Section 303, had interfered with their businesses (R. 17-28).[10] UMW denied the material allegations of the complaints (R. 29-34).

The cases were tried together without a jury and the District Court found UMW liable under Section 303 and under the common law of Tennessee and Kentucky. Findings and conclusions were filed on August 5, 1960, directing entry of judgment for Gilchrist & Sons in the amount of $239,000 compensatory and $79,000 punitive damages; for G & R in the amount of $20,000 compensatory and $7,000 punitive damages; and for S & R in the amount of $101,000 compensatory and $33,000 punitive damages, making a grand total of $479,000. (R. 54-133). On August 11, 1960, judgment was entered accordingly. (R. 134-155). On May 1, 1961, the Sixth Circuit Court affirmed (Certified Record).

3. The Facts, the Issues and the Decisions of the Courts Below

(a) The Parties

Petitioner, United Mine Workers of America, is an unincorporated labor organization. Plaintiffs are Snyder and Randolph, Inc., G & R Coal Co., Inc., and Gilchrist and Sons, a partnership composed of Wm. G. Gilchrist, Jr., Wm. G. Gilchrist, III, and James Blythe

[10] The abbreviation "R" refers to the Joint Appendix filed in the Sixth Circuit. References to page numbers therein will omit the letter "a".

(Trustee for Robert A. Gilchrist, a minor). Gilchrist, Jr., owns 60 per cent of the stock of G & R and is its President. Gilchrist, III, owns 30 per cent of the stock and is its Vice President. Myron Sitton owns 10 per cent of the stock and is its Secretary-Treasurer.

(b) Background of Dispute

Gilchrist & Sons held leases on a number of tracts of land in Tennessee and Kentucky. In addition, it owned mining equipment and processing and loading facilities (tipples) in Jellico, Tennessee.

In 1956 and thereafter, Gilchrist & Sons, under contract with G & R, furnished G & R with strip mine sites, mining equipment and tipples. G & R thereunder mined and hauled the coal to the tipples, operated the tipples and loaded the coal into designated conveyances for a stipulated price per ton. Gilchrist & Sons sold the coal so mined, prepared and loaded by G & R (R. 146-151, 159-162, 165, 166). G & R also processed and loaded coal purchased or sold on commission by Gilchrist & Sons and brought to the tipple by other operators (R. 202, 204, 211, 223, 236, 237).

G & R signed a collective bargaining agreement with UMW covering its 3 or 4 employees at its tipple and 10 or 12 employees at the mining site (R. 192). Gilchrist & Sons did not have any employees engaged in mining or tipple operations and hence was not an employer of any employees involved at any time during the controversy (R. 225-226, 240).

G & R gave UMW a sixty-day cancellation notice of its contract (R. 208, 239, 304), effective about March 1, 1959 (R. 821). The UMW had negotiated an amendment to its basic agreement with other operators in December 1958 which G & R "couldn't go along with"

(R. 206). This, *inter alia*, prompted G & R's notice of cancellation.[10a]

In January, 1959, G & R subleased nearby Kentucky coal lands to S & R. S & R also contracted with Gilchrist & Sons whereby S & R delivered coal to the G & R tipple in Jellico and Gilchrist & Sons sold the coal and paid S & R the sales price less a commission (R. 1204, 1205). S & R started operating on a non-union basis on February 9, 1959.

G & R and S & R each had entered into contract with "truckers" to haul the coal from the mines to the tipple. Some trucks were operated by the owners thereof and others by employees of truck owners (R. 1156-1157).

In February, Prater and Daniel, UMW District 19 representatives, held negotiations with G & R and S & R with a view to signing agreements but to no avail (R. 727, 756, 827-829, 833-834, 897-900).

Other operators in the area also refused to sign the new UMW agreement and widespread strikes resulted upon contract cancellation.

(c) The Alleged Illegal Conduct

On February 26, Prater and others went to G & R's mine and met its employees leaving work (R. 727). Prater asked them not to work after the expiration of

[10a] G & R had failed to pay in full a 40 cent per ton payment into a welfare fund as required in the UMW agreement. Similarly, its predecessor, in which Gilchrist, Jr. was principal, had not made full payments to the welfare fund. Prior to G & R's notice of cancellation, Gilchrist, Jr. had been threatened with suit by the welfare fund (R. 191, 1212, 1223). In UMW's fruitless 1959 negotiations with G & R, Gilchrist, Jr. voiced this as a point of dissatisfaction (R. 897-900, 929-931).

the contract. The men including the truck drivers who were present, were asked to join the union if they did not already belong (R. 374-375, 820, 826, 895-896, 1096-1097).

On March 2, after contract expiration, Prater and a local union official went to the entrance to the G & R mine and flagged truckers and miners going to work. Prater explained if they continued to work it would be on a non-union basis. He asked them not to work and told them they would be given aid by District 19. None of the truckers or employees worked that day (R. 375-377, 830-831, 1077-1079).

On March 3 and 5, Prater, Daniel and the District 19 Vice President discussed the proposed contract with G & R and S & R officers and said they would shut the mines down if agreement was not reached (R. 728-731, 731-732, 756-757, 834-835, 837-839, 900-901, 929-931).

The contract negotiations were held jointly because S & R would not sign a contract unless G & R also signed (R. 728). Randolph, Pres. of S & R, had explained to Prater that S & R was closely tied in with G & R and what G & R did he would more or less go along with (R. 834). Randolph had said he would discuss things with Gilchrist before S & R could make any move on the contract (R. 730).

On March 9, Daniel and others gathered at the entrance to G & R's tipple. Bryant, an employee of a trucking contractor hauling coal from S & R mines, was told by one of the group not to haul more coal there (R. 586-587). Daniel talked to a trucker and asked him to sign a union card and told him he hoped he would not be back (R. 902).

On the same day, Brown, a truck driver for Willie Johnson, who hauled coal to the G & R tipple from small, deep mines subleased by G & R, met with other truck drivers at a filling station away from the tipple. They knew of the pickets and decided not to haul coal. (R. 608-617)

On the night of March 9 or the early morning of March 10, Prater and Daniel heard that operations at the Jellico tipple were to be resumed and they, with a UMW member, went to the tipple entrance. Bays, a truck driver employed by a firm hauling coal for S & R, was asked or told to dump his coal in the tipple driveway. Bays returned later and dumped another load of coal in the same manner (R. 665-675, 842-847).

On March 9 and 10, S & R truckers refused to work (R. 741) and S & R miners decided to cease work (R. 947, 979, 1101). By this date 10 of S & R's 14 employees had signed UMW application cards (R. 841-842, 1100).

On March 10, Prater, Daniel and others went to the G & R mine entrance. They met truckers there and informed them the contract had not been signed and asked them not to haul coal (R. 854-855). Upon learning that some G & R employees had gone to the strip pits they proceeded there. John Hacker, Superintendent of G & R's mine, and his son, Harold, testified Prater threatened abuse if work continued. Prater denied it. Prater informed the employees they would lose their medical benefits and other benefits if they worked non-union. He reiterated that UMW would provide aid for its members. The employees went home (R. 539-542, 855-861, 908-911, 991-993, 1091-1094).

Sometime in March and thereafter, District 19 furnished the aid referred to by Prater on March 10. District 19 furnished food in amounts equal to $25.00 per week to all members out of work due to the dispute. This was handled by UMW local union committees (R. 868). These committees investigated and supervised this food plan to determine that only those eligible received it (as many as 3,700 men received it) and in proper amounts (R. 868-870, 1146-1153). Prater made arrangements with several restaurants in the area to feed these committees (R. 870).[11]

During March and April, Prater and Daniel with various members of the union drove in motorcades throughout the mining areas with placards advertising their "No Contract, No Work" tradition. (R. 847-852, 912-913, 938-939, 942).

(C. 1) Court's determination of Sec. 303 violation

The Sixth Circuit affirmed the District Court's holding that by the above facts UMW violated Section 303 ". . . in inducing employees of neutral employers to engage in a concerted refusal to transport or otherwise handle coal or perform services, *among the objects of such activity being to force or require employees of other employers and self-employed persons to cease doing business with the three plaintiffs . . .*" (Conclusion #2, R. 123-124) (Emphasis supplied); and that "the truck haulers and deep mine sublessees were independent contractors, and the inducement and encouragement for concerted action against the employees of the truck drivers and the deep mine operators was a secondary boycott" (Conclusion #4, R. 124).

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[11] Jack Lohr was a member of one of these committees (R. 879).

The District Court further found Gilchrist & Sons was damaged by violation of Sec. 303 by UMW "in inducing trucking employees of another employer to refuse to transport coal to the plaintiff's (Jellico) tipples and one of the objectives was to force Snyder & Randolph, Inc., and other persons to cease doing business with the partnership . . . The cutting off of the supply of coal to the Gilchrist tipples was one of the stated objectives of the Union. The statute requires only that this be one of the objectives, . . ." although another objective was to force Snyder & Randolph, Inc., and G & R to recognize the Union as bargaining agent of its employees. "Moreover, the hauling of coal belonging to the partnership was stopped by the secondary and other illegal activities of the defendant independently of any effect such activities may have had on the contractual relationship of the partnership with G & R Coal Company. The principal activities of the defendant in Jellico were secondary rather than primary activities and were directly aimed at Gilchrist & Sons, the partnership." (Conclusion 11, R. 126-127)

In addition, the District Court held that although Gilchrist & Sons was not a primary or secondary employer it may recover under Sec. 303(b), which reads: "Whoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor in any district court of the United States . . ." provided the damages are not too remote and subject of competent proof (Conclusion 12, R. 127-131). The Sixth Circuit approved of this finding on the basis that the partnership had an integrated coal business with G & R, an instrumentality controlled by its members, and that it was directly damaged by the unlawful interference. (A. 6a).

(C. 2) Court's determination of State common law violation

District Court also found, and the Sixth Circuit approved, this conduct constituted ". . . an unlawful interference with the business of plaintiffs in violation of plaintiffs' rights under the common law of Tennessee and Kentucky . . ." (Conclusion 10, R. 126). Furthermore, the District Court made additional findings of fact in which it found UMW liable for unlawful interference with the business of the plaintiffs in violation of the common law. The additional incidents, all occurring one and one-half months later and thereafter, are as follows:

On May 1, S & R resumed its operations with a new crew (R. 760-781). S & R contracted with truck owner-operators Arnold Spradlin, E. H. Harris and George Bray to haul coal to the G & R tipple (R. 741). G & R resumed operation of the Jellico tipple (R. 223).

Harris hauled coal two days. One night an unknown and unidentified person shot at his truck (R. 807).

George Bray testified an unknown and unidentified person dynamited his truck, parked at his brother's house (R. 644).

On the night of May 1, George Lindsay, a G & R repairman, returning home from Jellico was shot at by an unknown and unidentified person. After he entered his home a car drove past many times, and then some men walked past his house talking (R. 446-450). He could hear their voices but could not see them. He "pretty well" knew the voice of one of them—Bob Bailey, a UMW member (R. 458-461).

On Saturday night, May 3, Walter Fuston, a prospective G & R employee, got in a fight with the son of a UMW member who took care of a Local Union hall (R. 481, 483-484, 943-944, 1006-1007, 1014-1015).

On May 7, at approximately 12:30 A.M., two crushers, part of the Jellico tipple, were damaged by dynamite explosions. Williams, a railway employee testified that just prior to the explosion, approximately two blocks away from the tipple, he saw a man named Jack Lohr, a member of the union, walking in a direction away from the tipple (R. 491-503). Lohr and two other men were arrested, questioned and released by the Sheriff after consultation with the Assistant District Attorney (R. 958-960).

S & R then began hauling coal to a tipple in Gatliff, Kentucky owned by a man named Crowley but operated by S & R (R. 750). In early June, a trestle of the L. & N. R.R. serving the Gatliff tipple was dynamited by unknown and unidentified persons.

On June 16, S & R's auger was damaged by dynamite by unknown and unidentified persons. (R. 648-651, 743). The auger was repaired and S & R resumed operations. (R. 845-846, 774). In October, the Gatliff tipple was burned. The evidence does not establish whether this occurred in consequence of a deliberate act. There is evidence that on that day and shortly before the fire the S & R employees had been working on the tipple welding the equipment. (R. 760).

In January 1960, S & R moved to Bell County, Kentucky. (R. 750-765).

No evidence connects UMW with any of these incidents. Prater, Daniel and Edwards denied that they or UMW were connected in any manner with such shootings, dynamite explosions, etc. Prior to the reopening of G & R and S & R in May, District 19 had sent representatives to local unions in the area to caution members against the use of violence or threats

of violence. In response to a question by the Court, Prater said he was shocked by news of the destruction of property, that he had tried "to prevent anything like that happening in the area (he) served;" and that he "had nothing whatsoever" to do with it (R. 864-867, 913-916, 934, 1056, 1156).

The Sixth Circuit affirmed the District Court's conclusion that material facts supporting the action under Section 303 supported the common law action; that the Federal and common law claims were but different grounds of a single cause of action for wrongful interference with plaintiffs' business; and that it had jurisdiction under the doctrine of pendant or ancillary jurisdiction (Conclusions 1, 8, R. 123, 125).

Also affirmed was the District Court's holding that petitioner was responsible for all acts, detailed heretofore, committed by unknown persons. The District Court concluded that damage to the tipple resulted from union organizational activities either by union members, sympathizers, or by persons who were induced or encouraged to commit the wrongful acts by reason of the attitude of lawlessness that was brought about in the area by the union members who tried to force the plaintiffs and all other non-union coal operators to sign a union contract. (Finding 25, R. 116; Finding 38, R. 121; Finding 42, R. 123)

In Conclusion of Law #4 (R. 132) the District Court spelled out its legal theory of responsibility for the dynamiting of both the auger of S & R and the tipple of G & R. The District Court stated that petitioner created among its members a spirit of lawlessness and animosity towards plaintiffs, thereby creating a situation or climate in which the risk of harm to

their properties was greatly increased and that its conduct was a substantial factor in causing the dynamiting even though the result may have been contributed to by other forces and even though the acts of others not authorized by the defendant may have contributed to the result.

REASONS FOR GRANTING THE WRIT

Question #1

A. Decision Is in Conflict With Decisions of This Court

The Sixth Circuit's affirmance of the District Court's conclusion that Petitioner violated Sec. 303 of the Act in each case is in conflict with the decision of this Court in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951) and as further clarified in *Local 761, Int'l Union of Radio and Machine Workers* v. *NLRB*, U.S. , 6 L. ed. 2d 592.

Although *International Rice Milling*, *supra*, and *Local 761*, *supra*, construed Sec. 8(b)(4), the condemned conduct is the same in Sec. 303, the latter section providing a civil remedy for the wrongful conduct and Sec. 8(b)(4) providing an administrative remedy. The words used in both sections have the same meaning. *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694. Section 303 "is the counterpart of Sec. 8(b)(4) of the Act." *United Brick & Clay Workers* v. *Deena Artware*, 6 Cir., (1952) 198 F. 2d 637, cert. denied 345 U.S. 906.

(a) As to G & R

The conflict arises in the G & R case in the finding that the primary picketing at the G & R tipple and its strip mining site had as one of its objects the cutting off of the supply of coal to the tipple, although it had another object—to force G & R to recognize the union as the bargaining agent of G & R's employees (Conclusion No. 2, R. 123, Conclusion No. 11, R. 126-127). G & R had two locations where it conducted its business. One was the strip mine where it produced the coal and one in Jellico where it processed and loaded the coal into trucks or railroad cars. G & R contracted

with trucking contractors to haul the coal from the strip mine to the tipple. Therefore, the activity at each location was primary and the fact such picketing induced the employees of the trucking contractors not to haul the coal does not bring such picketing within the proscription of Sec. 303.[12] Petitioner did not engage in a strike against the trucking contractors, but directed its activity towards the primary employer. *International Rice Milling, supra.* Even under the common situs doctrine where stricter standards of interpretation are applied, the activity would would be lawful because (1) the employees of G & R and the secondary employers used the same entrances, and (2) the secondary employers were performing work "necessary to the normal operations of the business." Thus, such activity was in complete conformity with the standard set forth in *Local 761, supra.*

The Sixth Circuit's error is found in its reliance on *UMWA* v. *Osborne Mining Company, Inc.*, 6 Cir. (1960), 279 F. 2d 716, cert. denied 364 U.S. 881, wherein it misconstrued *International Rice Milling Co., supra*, by giving it too narrow an interpretation. The Sixth Circuit therein stated, "The activities of the defendants were not directed against a single neutral party as in *NLRB* v. *International Rice Milling Company . . .*", "but to many neutral employers and their employees." . . . "The statute proscribes certain activities irrespective of where they take place. *Even in picketing at the premises of a primary employer the union must exercise its rights consistent with the right of neutral employers to remain uninvolved in the dispute. Retail*

[12] The "neutrality" of the truckers should be considered in light of the fact they performed a routine step in the operation and Gilchrist's assertion he "hired and fired the truckers" as it suited him. (R. 1157).

Fruit & Vegetable Clerks Union v. *N.L.R.B.*, 9 Cir. (1957) 249 F. 2d 591; . . . *Deena Artware*, . . .". (Emphasis supplied). Thus, the Sixth Circuit, in seeking to follow the Congressional "objective of protecting neutral employers" ignored the Congressional objective of permitting employees and unions to engage in an ordinary primary strike even if secondary employers are affected by the strike, *International Rice Milling*, *supra*, and repeated in *Electrical Workers*, *supra*. *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 686.

The Sixth Circuit also ignored the fact that *Retail Fruit* was a common situs case with primary and secondary employers performing separate, unrelated tasks and, although the Board and the Ninth Circuit applied a strict application of the tests which the Board previously set forth in the *Moore Drydock* case, *Sailor's Union of the Pacific*, 92 NLRB 547, the Board made clear that it would follow the rule that more latitude be given to picketing at such separate primary premises occupied in part by secondary employees, 116 NLRB at p. 860, n. 10. But in the instant case, the secondary employers were not performing separate tasks but were actually carrying on the business of the primary employer.

Deena Artware, *supra*, also presented a situation whereby the union extended its picketing beyond the area of the primary dispute to include locations and entrances used by a general construction contractor doing construction work rather than the normal business of Deena Artware and such picketing was only at times that this construction work was being done.

(b) As to S & R

In the S & R case only the picketing at the G & R tipple in Jellico was involved. Therefore, S & R presents another of the protean forms of activity that may arise under Sec. 303 and one not yet considered by this Court or any of the Courts of Appeals. Here Petitioner was engaged in a dispute with two employers simultaneously. Here, as in the G & R case, the neutral employer was the trucking contractor employed by S & R to deliver coal from S & R's mines to G & R's tipple. G & R had subleased some of its coal lands to S & R and the coal was processed over G & R's tipple under S & R's contract with Gilchrist & Sons. Recognizing their interrelated businesses, S & R would not sign a contract with Petitioner unless G & R did and stated that what G & R did S & R would go along with, and therefore, the collective bargaining negotiations were conducted jointly (R. 728-730, 834).

However, the picketing at G & R's tipple which induced truckers not to haul S & R's coal was still primary picketing because of Petitioner's dispute with G & R. Certainly Congress did not intend to permit an employer to subcontract or sublease part of its business to another employer who in turn engaged a third employer to haul the product between them thereby preventing the employees from exercising other protected rights under the Act, on the theory that such activity at each of their business locations would become activity away from the primary premises of both of them. Under such a construction, if Petitioner had picketed the S & R mine, which it did not, G & R could claim that, although such picketing was primary to S & R, it was secondary to G & R, as the neutral truckers were hauling coal to its tipple and the purpose was

to get S & R to cease doing business with G & R—thus emasculating the rights guaranteed by the Act to employees of both employers. No such chameleonic attributes should be placed upon such picketing. Nor is such construction warranted to accommodate the dual Congressional objectives. It would be impossible to free the truckers from the dispute and still preserve the employees' right to engage in an ordinary strike. As long as the action remained at the premises of a struck employer and did not extend to the premises of the secondary employer, the Congressional intent is fulfilled. Under the reasoning of the Sixth Circuit, the only way the activity of the union in S & R dispute could remain lawful would be to engage in concerted activities at a time there was no dispute with G & R and vice versa. Petitioners submit no such Congressional limitation can be found in the terms of the act or its legislative history.

In addition, it can be persuasively argued that because S & R was delivering coal subleased from G & R to G & R's tipple to be processed by G & R for S & R the tipple was a common situs of both G & R and S & R. Therefore, the picketing was not away from the premises of S & R. Stated another way, the picketing was not extended away from the primary employer's premises to the premises of a secondary employer. Also, the Court allowed G & R damages for this picketing.

For the reasons heretofore set forth, although involving additional facts than in G & R, the Sixth Circuit's judgment in the S & R case is in conflict with the principles of construction enunciated in *International Rice Milling* and *International Brotherhood of Electrical Workers, supra*, and the arguments presented as to G & R are applicable to S & R.

(c) As to Gilchrist & Sons

Although the District Court found the picketing constituted a secondary boycott against Gilchrist & Sons, the Sixth Circuit did not rely upon such finding but found that Congress permitted anyone under Sec. 303 (b) to sue, even though not a primary or secondary employer, if such person were directly injured by the secondary boycott. The latter question is the basis of Question #2. However, the District Court concluded the picketing of G & R's tipple was for the purpose of causing S & R to cease doing business with Gilchrist & Sons. Nothing in the circumstances indicates any such intent or object. It could not have had this purpose because Gilchrist & Sons, not having employees engaged in coal mining, was not engaged in a dispute with the union. Such a finding is not based upon any reality of the factual situation and is further illustrative of the misconstruction placed upon the Act. To find a violation in the S & R case it found S & R a primary employer. To find a violation in Gilchrist & Sons it made S & R a neutral employer.

In addition, the District Court found the picketing was for the purpose of inducing the employees of the deep mine operators (also sublessees of G & R) to engage in concerted activity to force the deep mine employers to cease doing business with G & R. Nothing is contained in the record on which to base such finding, nor did the District Court make any such Findings of Fact. The only evidence involving these employers was supplied by an employee of a trucking contractor hired to haul coal from such deep mine employers. He testified that after learning of the dispute and learning of the picketing he quit hauling coal. Not a single witness testified regarding any employee of any such

deep mine operator. This further illustrates the District Court and Sixth Circuit's confusion and misconstruction of Sec. 303.

B. The Sixth Circuit's Decision is in Conflict With Decisions of Other Circuits

The Sixth Circuit's ruling making primary activities actionable which has the effect of inducing employees of secondary employers to cease transporting goods belonging to another employer across a picket line is in conflict with the decisions of other Circuits in *NLRB* v. *Service Trades Chauffeurs, etc.*, 2 Cir. (1951), 191 F. 2d 65; *NLRB* v. *Local 294, Int'l Bro. of Teamsters*, 2 Cir., (1960) 284 F. 2d 887, 889; *DiGiorgio Fruit Corp.* v. *NLRB*, D.C. Cir. (1951), 191 F. 2d 642; *Local 618, Automotive Petroleum and Allied Industries Employees Union* v. *NLRB*, 8 Cir. (1957), 249 F. 2d 332; cited in *Piezonki* v. *NLRB*, 4 Cir. (1955), 219 F. 2d 879, wherein the Fourth Circuit expressed similar views, although the facts involved were not similar.

The Second Circuit completely rejects the Sixth Circuit's construction of Sec. 303 in *Osborne*, and as repeated in the instant case, that the union must exercise its rights, even in primary picketing, consistent with the right of the neutral employer to remain uninvolved in the dispute when it pointed out in *Service Trades Chauffeurs, etc.*, 191 F. 2d at p. 67: "The Taft-Hartley Act does not completely shelter neutrals—in this case, the so-called secondary employer. If it did, strikes would often be hopelessly crippled. Instead the Act recognizes and undertakes to reconcile the competing claims of unions to strike and bystanders to be free of harm from so-called 'secondary boycott' ".

C. A Question of Importance

The question presented is one of importance because of the conflict of opinions of the lower courts in their interpretation of this important federal statute. Problems involved are of wide import dealing with basic rights of labor unions under the Constitution and laws of the United States. This question has not been but should be resolved by this Court in order to insure a uniformity of construction of the Act.

To permit a union to be held liable for damages caused by primary picketing which has the effect of inducing employees of independent contractors to cease performing services for the primary employer would emasculate labor's rights under the Act to an even greater degree than to make it an unfair labor practice under Sec. 8(b)(4). The construction of Sec. 303 in the instant cases is at variance with this Court's and several Circuit Courts' construction of the same conduct under Sec. 8(b)(4). Logic and reason lead to the conclusion that Congress intended what is permissible under Sec. 8(b)(4) also is permissible under Sec. 303, but it was held otherwise in *Southern Coal Co., etc.* v. *UMWA*, Civil Action No. 284, wherein the U. S. District Court, Eastern District of Kentucky, entered judgments against UMWA on June 27, 1961 for the grand total of $264,000 and the same District Court entered judgment on Jan. 18, 1961, in the case of *Elkay Coal Company, et al.* v. *UMWA*, Civil Action No. 555, U.S.D.C., E.D. Ky., against UMWA for a grand total of $104,845. UMW is now perfecting an appeal of these judgments in the Sixth Circuit. Each is based upon the same construction of Sec. 303 as in the instant cases. Numerous other cases are pending in this same district with the District Court indicating on June 26,

1961 that there would be no further adjudication until further clarification by this Court in the instant cases.

In addition, some twenty-two suits have been filed and are presently pending against UMWA in the federal courts of Kentucky, Tennessee and Alabama which involve claims totaling over $18,000,000.

Noteworthy is the fact that the mode of operation of the plaintiffs in the instant cases is common in the coal industry. The prime operator sets up a series of business organizations to perform the separate tasks of producing coal—one to lease or own the coal lands, one to operate the mines, one to operate the tipple and still another to sell and market the coal. This arrangement provides a favorable tax setup and protects those with assets from liability that arises in such undertakings, as Gilchrist, Jr. testified was the purpose of incorporating G & R (R. 157, 233). This arrangement leaves them free from liability for unpaid wages, unpaid royalty to welfare funds set up for their employees,[13] as well as any other liability that might be incurred, such as minimum wage standards, etc. But should a narrow, artificial and unrealistic construction of Sec. 303 be placed upon such an arrangement to also permit the operator to wipe out the rights of his employees and the union rights provided by other sections of the Act?

This mode of operation is not unique to the coal industry but is commonplace in almost all industries so

[13] UMW Welfare Fund obtained a judgment against Gilchrist & Sons for failure to pay into the Welfare Fund 40 cents per ton as required by UMW Contract, in the amount of $87,315.16. *John L. Lewis et al. v. William Gilchrist et al.*, Civil Action No. 3398, April 6, 1961 in the Dist. Court, Northern Dist. of Ala. Northeastern Division.

that the crushing impact of these decisions will not be solely upon coal miners.

Furthermore, the situation in S & R presents the secondary boycott problem in another form not heretofore decided but which should be decided by this Court and is bound to arise again, not just in the pending cases, but in the economic struggles in the coal industry in the future and in other industries as well.

Question #2

The Sixth Circuit held that Gilchrist and Sons, though not the employer of employees primarily or secondarily involved in a dispute, had the right to recover under Section 303 on the theory that its business was integrated with that of a controlled corporation which was primarily involved. (A. p. 5a-6a) The decision thus presents an important Federal question under Section 303. The Sixth Circuit's decision is in conflict with Congressional intent in the enactment of Section 303 and is in conflict with its own decision in *United Mine Workers of America* v. *Love and Amos Coal Company*, 6 Cir., (1960), 279 F. 2d 716.

That a labor dispute has an effect on employers or business concerns other than the one immediately involved, is an elementary fact of economic life. Every person having a relationship with a strike-bound employer suffers from the dispute and the severity thereof depends on the degree of the relationship.

The instant case presents the important question of whether Congress intended to protect a person who is not primarily or secondarily involved in a given dispute but who has a close relationship with one who is so involved.

Gilchrist and Sons was not a party to the dispute. It had no employees at either the mine or tipple for it elected that those operations should be carried on, without risk of personal liability incidental to the employer-employee relationship, through a corporation, G & R. Gilchrist and Sons' connection with the dispute thus was confined to these factors: It owned the equipment by which G & R mined and processed coal; it held title to the coal mined by G & R; and it purchased or sold coal delivered by others, including S & R, to the tipple operated by G & R. The Sixth Circuit found from these factors that Gilchrist and Sons' operations were integrated with those of G & R and that such integration sufficed to entitle Gilchrist and Sons to sue under Section 303.

The Sixth Circuit did not consider that Petitioner's inducements of G & R and S & R employees and of truck drivers (the so-called "secondary" employees) focused not upon equipment or coal owned or purchased or sold by Gilchrist and Sons but upon G & R and S & R, from whom Petitioner sought collective bargaining agreements. It is entirely possible that Gilchrist and Sons' business was harmed but the Sixth Circuit failed to recognize that such harm did not result from a secondary boycott; it resulted from the inability of G & R, to mine coal or operate the tipple and the refusal or inability of others to bring coal to the tipple operated by G & R. If Gilchrists & Sons' business was harmed and if its property was damaged by Petitioner Gilchrists & Sons may have an action under state law. It does not have an action under Sec. 303.

The key to the question necessarily is found in Section 303(b), which provides "*whoever* shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore" (emphasis supplied) and the question posed requires determination of the intended meaning of this provision.

Strong indication of its meaning is found in the Congressional history of the Act, for as Senator Taft noted the provision's language paralleled the Sherman Act and accordingly "the way would not be opened to sue for secondary damages." *The New Labor Law*, (BNA, 1947) p. 78; see also 93 Cong. Rec. 5074-5. The Sherman Act provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." 15 U.S.C. Section 15 (Emphasis supplied).

Heretofore the Sixth Circuit, in the only reported cases of which we are aware on the scope of Section 303(b), gave express recognition to the analogy in the Sherman and Taft-Hartley Acts. See *Deena Products Co.* v. *United Brick & Clay Workers of America*, 6 Cir., (1952), 195 F. 2d 612; *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 6 Cir. (1952), 198 F. 2d 637; *United Mine Workers of America* v. *Love and Amos Coal Company*, 6 Cir., (1960), 279 F. 2d 716. Of these decisions *Love and Amos* is particularly in point. In that case a coal sales agency, under contract with a mining company of which its principals owned half, sold the mining company's coal upon commission and contended that it had been damaged by a federally proscribed boycott of the mining company. Though the District Court had found that interference with the Love and Amos business had been a purpose of UMW in its alleged boycott of the mining company, it held the term "whoever," as found in Section 303, did

not permit suit by one consequentially injured.[14] In so doing it relied on antitrust decisions in which persons in positions comparable to Love and Amos were found without federal remedy. In particular it found persuasive *Melrose Realty Co., Inc.* v. *Loew's, Inc.*, 3 Cir., (1956), 234 F. 2d 518, in which the claim of a non-operating owner-lessor of a motion picture theatre with a percentage lease was denied; *Martens* v. *Barrett*, 5 Cir., (1957), 245 F. 2d 844, in which the claim of sole stockholders of a corporation was denied; *Productive Inventions, Inc.* v. *Trico Products Corp.*, 2 Cir., (1955), 224 F. 2d 678, cert. denied 350 U.S. 936, in which the claim of a patentee who had granted an exclusive license for the term of the patent on a royalty basis was denied; and *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, D.C. Mass., (1956), 147 F. Supp. 907, wherein the claim of a person having a profitable relationship with another was denied.

Petitioner submits the relationship of Gilchrist and Sons to G & R in the instant case is not materially distinguishable from those in the Sherman Act cases found persuasive by the Sixth Circuit in *Love and Amos* and that the distinction made by the Sixth Circuit herein of its *Love and Amos* decision is completely without justification. The fact that the business of Gilchrist and Sons and G & R were "integrated" is not an adequate basis for such distinction. Judge Wyzanski dealt with this precise question in *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc., supra*, a

[14] As in the instant case, Love and Amos had also been granted judgment under state law. But there, upon holding that Love and Amos "never had and could not assert any federally recognized cause of action or ground for recovery" the Sixth Circuit went on to hold that the District Court had no jurisdiction to determine the state claim.

Sherman Act case. Recovery was there denied to a corporation whose business was integrated with that of another corporation owned by substantially the same interests and whose business "as a matter of logic" has been foreseeably damaged in the controversy. The Court said (147 F. Supp. 907, 909):

> "Those who organized the corporations chose to take the advantages and disadvantages which flow from separate legal personalities. Cf. Timken Roller Bearing Co. v. United States, 341 US 593, 71 S. Ct. 971, 95 L. Ed. 1199. They placed only one of the two corporations in direct competition with defendant. And their choice limits their potential recovery."

This language is peculiarly in point for, as in *Snow Crest,* Gilchrist and Sons made its choice of mode of operation. And it did so in such a way as to avoid the potential liabilities of a UMW contract which its affiliate, G & R, materially failed to carry out. It did so, quite obviously, to legally isolate itself from the labor scene of which it now says it was the central part.

It is evident from the foregoing that the Sixth Circuit has given effect to an important Federal statute, the scope of which was "narrowly conceived," *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 100, in a manner inconsistent with Congressional intent, that its action is in conflict with analogous decisions of other Courts of Appeal, and that its decision presents an important Federal question in the administration of the Act which has not been, but should be, settled by this Court.

Question #3

The Sixth Circuit's approval of the District Court's assertion of jurisdiction of a state claim joined with a claim under Section 303 on the theory that the state and federal claims were but different grounds of a single cause of action supported largely by the same facts, presents an important federal question concerning application of the doctrine of ancillary or pendant jurisdiction in the field of labor law. The determination is in conflict with Congressional intent in the enactment of Section 303 and with the decision of the Fourth Circuit in *United Mine Workers of America* v. *Patton*, 4 Cir., (1954), 211 F. 2d 742.

In two prior cases the Sixth Circuit concluded that power to determine a state claim arising out of a labor dispute resides in a District Court under the doctrine of ancillary or pendant jurisdiction where the state claim is factually related to a claim under Section 303. In each case the Sixth Circuit found applicable the rule of *Hurn* v. *Oursler*, 289 U.S. 238. *United Mine Workers of America* v. *Meadow Creek Coal Company*, 6 Cir., (1959), 263 F. 2d 52, cert. denied 359 U.S. 1013; *United Mine Workers of America* v. *Osborne Mining Company, Inc.*, 6 Cir., (1960), 279 F. 2d 716, cert. denied 364 U.S. 881. In the instant case this power was confirmed though the facts were, as we think, entirely primary, or, if we are mistaken in this contention, predominately primary. And the power was confirmed upon complaints which were expressed entirely in terms of Section 303 without mention of state law.[15]

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[15] Five days before trial a pre-trial order was entered which makes reference to the state claim. UMW excepted to this claim because of the absence of reliance on state law in the complaint (R. 46).

The principle announced in these three decisions, and the present decision in particular, is of utmost importance in labor law for it manifests the accomplishment by indirection through decisional law of what Congress refused to do by way of statute. It makes federal courts the forum for the determination of broad state claims of union interference arising from labor disputes in the absence of independent grounds of federal jurisdiction.[16]

Petitioner insists that adjudication of such a state claim in federal court under the *Hurn* theory is an assertion of jurisdiction contrary to positive Congressional intent. In 1947 Congress considered but rejected a statutory plan which would have directly accomplished the result herein achieved, for bills passed in the House would have made actionable the same conduct here found illegal under state law.[17] But instead of enacting such a broad prohibition, Congress singled out and proscribed only the more narrow area of union conduct known as secondary boycotts.

The course of labor litigation under federal law and in federal forums prior to 1947 further points to the conflict in Congressional intent and the Sixth Circuit's decision. Prior to 1947, the only federal statute of general consequence affording a cause of action against labor organizations was the Sherman Act, 15 USC Section 1, et seq., and history teaches that the variant

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[16] Petitioners do not argue that a union may not be sued in state courts under state law for damages which flow from interference to a business by breach of peace. *San Diego Building Trades Council* v. *Garmon*, (1959) 359 U.S. 236; *United Construction Workers* v. *Laburnum Construction Corp.*, (1954) 347 U.S. 656.

[17] Legislative History of the Labor Management Relations Act, 1947, Vol. I, pp. 158, 204, Sec. 12 of HR 3020.

forms of its use against labor organizations was initially as severe, *Loewe* v. *Lawlor*, 208 U.S. 274 and 235 U.S. 522, as it was unpredictable, *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443. This is not to say that the common law did not play its part in federal forums in labor litigation. Such notable cases as *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U.S. 229, and *United Mine Workers of America* v. *Red Jacket Consol. Coal & Coke Co.*, 4 Cir. (1927), 18 F. 2d 839, show traditional instances, in the jurisdictional sense, of common law adjudication in federal courts, for in those cases a diversity of citizenship was found to exist. It has been said that during the period from 1891 to 1927, probably two-thirds of the labor cases found their way into federal courts on claims of diversity, *The Labor Injunction*, Frankfurter and Greene, p. 210.

But the substantive principles followed in these cases, which were quite adverse to labor, in the end proved self-defeating. An aroused public opinion, reflected in the Norris-LaGuardia Act, 29 U.S.C. Section 201, et seq., condemned federal intervention in such cases. That Act narrowed drastically the availability of federal courts in labor controversies, and a thoughtful judiciary made it clear that Norris-LaGuardia had legal as well as equitable and procedural consequences, *United States* v. *Hutcheson*, 312 U.S. 219.

An important landmark in the changing scene gave expression to a rule specifically germane to the question here presented. Consistent with the attitudes which prevailed after Norris-LaGuardia, this Court, in *Apex Hosiery Company* v. *Leader*, 310 U.S. 469, a sit-down strike involvement, stated that in a "suit, in which no diversity of citizenship of the parties is

alleged or shown, the federal courts are without authority to enforce state laws," and that federal jurisdiction "is to vindicate such federal right as Congress has conferred . . . and violence . . . however reprehensible, does not give the federal courts jurisdiction." So, too, in *Hunt* v. *Crumboch*, 325 U.S. 821, 826, wherein plaintiff relied upon acts alleged to be violative of the Sherman Act identical to those which would have been considered under Pennsylvania's common law, this Court stated that "Whether the respondent's conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law *is not our concern.*" (Emphasis supplied.)

Congress had these then recent cases in mind in 1947 while considering passage of the Taft-Hartly Act. When it is considered that Congress, in light of these cases and in the course of enacting the bitterly contested legislation, not only failed to proscribe "common law" interference but expressly rejected such a provision after House approval and, in its stead, adopted a provision dealing narrowly with a particular form of union conduct and gave federal courts jurisdiction to award damages therefor, the contention that Congress nevertheless intended state law claims grounded on general interference to be adjudicated as part and parcel of the federal cause on a theory of ancillary jurisdiction having its legal genesis in the relatively prosaic field of copyright law, is completely negated and destroyed. At the least such a contention and its affirmation in a case of the magnitude of the instant case is worthy of the consideration of this Court.

The only other case in which a United States Court of Appeals has considered the precise question here raised

is *United Mine Workers of America* v. *Patton*, 4 Cir. (1954), 211 F. 2d 742. In that case the Fourth Circuit, unlike the Sixth Circuit herein, rejected a contention that in a Section 303 cause of action a federal court was nevertheless warranted in awarding punitive damages for the common law tort of interference even though such damages were not recoverable under the federal statute. Holding that Section 303 "makes no provision for the recovery of punitive damages," the Fourth Circuit said:

> "This is not a case brought under the diversity jurisdiction of the federal courts to enforce a common law liability . . . and the plaintiffs are entitled to invoke the jurisdiction of the federal courts only because they sue on a cause of action created by a federal statute, i.e., on the cause of action created by Section 303(b) of the Labor-Management Relations Act . . ."

This language accords in principle with that of *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 4 Cir. (1948), 167 F. 2d 183, 186 (which was quoted with approval by this Court in *General Committee, etc.* v. *Missouri-K.-T. R.R. Co.*, 320 U.S. 323, 332, 333), in which the Fourth Circuit said:

> "Congress has been highly selective in its use of legal machinery. . . . The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provision of the Act indicate."

Finally, Petitioner says the doctrine of ancillary or pendant jurisdiction should not have been applied in this case for the federal and non-federal claims do

not, as stated in the *Hurn* case, "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." Even acceptance of the lower courts' views on what constitutes secondary activity leaves much of the union conduct in this case unquestionably primary. Certainly, for example, the union's inducements of G & R employees at the mine was singularly primary, as well as all the activity after May 1 which was unrelated to inducement of employees of the trucking contractors in March.

Moreover, the legal significance of conduct varies in claims under Section 303 and state law. Conduct in breach of the peace has no significance under Section 303, *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665. On the other hand, under *San Diego Building Trade Council* v. *Garmon*, 359 U.S. 236, violence or a breach of the peace is the essential element in a claim against a union for interference based on state law. Similarly, as the award in the instant case of $119,000 in punitive damages makes clear, union conduct in state cases is considered from the standpoint of punitive damages, whereas punitive damages may not be awarded under Section 303, *United Mine Workers of America* v. *Patton*, supra.

If the will of Congress expressed in Section 303 is to be given any meaning at all, primary conduct would have no material bearing on the question of whether the union at some other time and in some other manner engaged in a secondary boycott. The lower courts, however, lumped these facts and all other facts incident to the dispute together and rendered a judgment which,

as we think, has nothing or little to do with activity proscribed by Section 303.

The absence in the instant case of a common or substantially identical set of facts[18] in the federal and non-federal claims, affords additional reason why the rule of ancillary or pendant jurisdiction as applied herein should be considered by this Court.

Question #4

The Sixth Circuit approved the District Court's conclusion that UMW was responsible for acts of destruction to respondents' property and other alleged acts of violence, though no UMW agent or member or, indeed, no identified individual was shown to have been implicated therein. Such a conclusion is in conflict with the decision of this Court in *U.S.* v. *White*, 322 U.S. 694; with that of the Court of Appeals for the District of Columbia in *International Ladies Garment Workers Union* v. *NLRB*, D.C. Cir. (1956), 237 F. 2d 545; and with the principle expressed by the Fifth Circuit in *NLRB* v. *Tex-O-Kan Flour Mills, Inc.*, 5 Cir.-(1941), 122 F. 2d 433. It is also in conflict with Congressional intent with regard to an action under Section 303 or the common law. The conclusion manifests error of the most prejudicial nature and gives rise to a question of great importance in the administration of the Act.

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[18] Where there has been an absence of common facts, joinder of a non-federal claim has been denied. *Stray* v. *Devine's Inc.*, 7 Cir. (1954), 217 F. 2d 187; *Landstrom* v. *Thorpe*, 8 Cir. (1951), 189 F. 2d 46; *Kaplan* v. *Helenhart Novelty Corp.*, 2 Cir. (1950), 182 F. 2d 311; *Kleinman* v. *Betty Dain Creations, Inc.*, 2 Cir. (1951), 189 F. 2d 546; but see *Maternally Yours* v. *Your Maternity Shop*, 2 Cir. (1956), 234 F. 2d 538; *Crabb* v. *Welden Brothers*, 8 Cir. (1947), 164 F. 2d 797; *French Renovating Co.* v. *Ray Renovating Co.*, 6 Cir. (1948), 170 F. 2d 945.

The District Court predicated its conclusion on the finding that a "climate of lawlessness" had been created by the "unlawful acts and coercive attitude of Prater and Daniel and of persons with whom they were associating." (R. 116) At the same time, however, the District Court also concluded that "the acts of others not authorized by the defendant may have contributed to the result" (R. 132).

We submit that this question cannot and should not be determined on the basis of such inflammatory and conclusory expressions as "climate of lawlessness." We acknowledge the District Court concluded that union activities, in which union agents were involved, particularly during initial phases of the dispute, exceeded permissible forms of union persuasion. But it is another matter to translate those picket line activities, which took place in the context of a dispute involving many employers and some thirty-seven hundred employees, into a form of blanket authorization to persons unknown to commit acts in utter disregard of law.

We ask this Court to recognize that the District Court's approach left petitioner virtually defenseless before the bar of justice. UMW's categorical denials and its uncontradicted explanations of the steps it took to urge its members to abide by the law (R. 863, 865, 914, 933-934), which is precisely all that organization or any organization in its place could do, were, evidently, without the slightest effect on the Court. The District Court's thesis admits of no evidence which would preclude union liability short of actual and positive demonstration that some person unconnected with the UMW and, apparently, without sympathy for its cause, was the actor in the events in question. This is an extraordinary burden on a litigant upon whom no burden of proof rests.

The rule approved by the Sixth Circuit is reminiscent of the long rejected law of conspiracy as developed in early labor cases. Under this law Mr. Justice Frankfurter, dissenting in *United Brotherhood of Carpenters and Joiners* v. *U.S.*, 330 U.S. 395, 419, observed that unions

> "were held responsible not for acts of agents who had authority to act, but for every act committed by any member of a union merely because he was a member, or because he had some relation to the union although not authorized by virtue of his position to act for the union in what he did."

Or it might be compared to the rule enunciated in the *Debs* case (In re *Debs*, 158 U.S. 564) where it was held that a union which called a strike might be held responsible for violations of criminal law though violations were not shown to have been permitted by union agents and the union did everything possible to prevent them.

In the instant case no evidence implicates union members, let alone agents, in the violent acts in question and it thus may well be concluded that the District Court's rule compares unfavorably, from petitioner's standpoint, with the rejected concept of conspiracy.

But the standard applied in the *Debs* case and the countless cases which followed did not survive the Norris-LaGuardia Act, 29 U.S.C. Section 106, nor was it revived by Taft-Hartley, 29 USC 185(e); and the rule here approved collides with the requirements of the latter Act, which makes agency and not theoretically envisioned culpability, the basis upon which liability may be predicated. *Perry Norvell Co.*, 80 NLRB 225, 243 (1948). Under Taft-Hartley, union

membership is not equivalent to agency;[19] nor is a member's prominence in a union's organizing campaign "sufficient to establish such agency," *Electric Wheel Co.*, 120 NLRB 1644, 1647 (1958).

"Suspicion is not proof" the Pennsylvania Supreme Court has said in a similar context, *Fife* v. *Great Atlantic & Pacific Tea Co.*, 356 Pa. 265, 52 A. 2d 24, 37 (1957). The Labor Board said the same thing in *National Union of Marine Cooks and Stewards*, 87 NLRB 54, 75 (1949) where two men were beaten in the course of a labor dispute, by unidentified assailants: "The testimony suggests that some members of the Respondent union may have committed the assault . . ., but that is mere speculation. . . . Under these circumstances I do not feel warranted in finding the Respondents responsible for the assault on [the two men]". And similarly in *Lumber and Sawmill Workers Union*, 87 NLRB 937, 940-941 (1949), the Board said, "There is absolutely no evidence to connect the Respondent with Knights' [the alleged agent] action. *A suspicion is not evidence, nor is it a substitute for proof.*" In *Blue Ridge Coal Corp.*, 129 NLRB No.

[19] Senator Taft, during Taft-Hartley debate, stated that ". . . I do not think there is anything in the fact that a union is an unincorporated association which would bring about a condition in law that the act of every member is necessarily charged to the labor organization" Legislative History of the Labor Management Relations Act, 1947, p. 1026). Again, Senator Taft declared that "the fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent" (Ibid. pp. 1204-5). See also *U.S.* v. *White*, 322 U.S. 694, 702, where it was declared that "actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question."

19 (1960), the Board refused to find UMW liable for an assault, saying:

> "This incident occurred more than a mile distant from the entrance to the Marra Brothers mine, and Williams was unable to identify any of the men present. Under these circumstances, and particularly in view of the facts that there was no union agent present who might have repudiated the threat and no evidence that the men who made the threat were pickets, we do not attribute responsibility for this incident to the Respondents."

Agency cannot be imputed, as the District Court's opinion implies, on a union's failure to "repudiate" violence occurring in the course of a dispute. *International Ladies Garment Workers Union* v. *NLRB*, D.C. Cir., (1956) 237 F. 2d 545, makes clear that "silence provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown."

The essence of the District Court's rule is to raise suspicion to the status of fact in a manner heretofore condemned, *NLRB* v. *Columbia Enameling & Stamping Co.*, 306 U.S. 292, 300; and the anomaly in the instant case is pointed up by the fact that whereas, in most of the cases cited, the rule has been rejected where cease and desist orders or injunctions have been at issue it was applied in the present case as the basis for the award of an enormous money judgment. As such it surely conflicts with *NLRB* v. *Tex-O-Kan Flour Mills, Inc.*, 5 Cir., (1941), 122 F. 2d 433, where it was said:

> ". . .; a cease and desist order on this point costs no money and only warns to observe a right which

already existed; evidence short of demonstration may easily justify such an order.

"Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough."[20]

Petitioner asserts that the problem here discussed is predominately one of law and that the standard of liability to be applied in such cases raises an important federal question under the Act which this Court has not, but should, determine. It raises also, if the application of the doctrine of ancillary jurisdiction is approved herein, the important federal question of the standard to be applied in federal courts on state claims arising from labor disputes, for it will be noted that the exacting demand of "clear proof" specified by Norris-LaGuardia's Section 6, 29 U.S.C. Section 106, and spelled out in *United Brotherhood of Carpenters and Joiners* v. *U.S.*, 330 U.S. 395, is required in all suits arising from labor disputes "in any courts of the United States," save those specifically brought under the Taft-Hartley Act.

It is therefore submitted that review by this Court is requisite to correct manifest error and gross injustice and to resolve the important question posed.

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[20] See *Union Responsibility for Acts of Officers and Members*, 63 Harvard L.R. 1035, at page 1046.

CONCLUSION

For the reasons herein discussed, Petitioner prays that this petition for writ of certiorari should be granted and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit, entered in Case Nos. 14,379 and 14,380 on May 1, 1961, as aforesaid.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14379-80

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III, and JAMES BLYTHE, Trustee for ROBERT A. GILCHRIST, a Minor, PARTNERS, d.b.a. GILCHRIST & SONS; and G & R COAL CO., INC., *Plaintiffs-Appellees*,

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*.

SNYDER AND RANDOLPH, INC., *Plaintiff-Appellee*,

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*.

On Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided May 1, 1961.

Before: McALLISTER, WELCK and O'SULLIVAN, Circuit Judges.

WELCK, Circuit Judge. Gilchrist & Sons, a partnership, and G & R Coal Company, Inc., a corporation, instituted action in the District Court against United Mine Workers of America, a labor organization,[1] to recover compensatory

[1] Gilchrist & Sons will be referred to herein as "partnership"; G & R Coal Co., Inc. as "G & R"; United Mine Workers of America as "UMW"; Snyder & Randolph, Inc. as Snyder and Randolph.

and punitive damages for the alleged violation of the secondary boycott provisions of the Labor-Management Relations Act of 1947 as amended. 29 U. S. C. Sec. 187. It was averred in the complaint that the plaintiffs were engaged in the mining of bituminous coal in the Jellico, Tennessee-Kentucky area; that in March 1959 and subsequent thereto UMW induced their employees to concertedly refuse to work on coal produced by other employers and induced the employees of other employers to concertedly refuse to work on coal which was to be brought to plaintiffs premises; that the purpose of such conduct was to compel plaintiffs to bargain with UMW as the representative of their employees although the Union had not been certified as a representative of said employees by the National Labor Relations Board as required by the Act. Plaintiffs' causes of action were based on the provisions of the Act and also the common law of Kentucky and Tennessee.

Snyder & Randolph, Inc., a corporation, filed a similar action on the same day in the District Court.

The two cases were tried together by the District Judge without a jury from June 20, 1960 through June 30, 1960. The District Judge handed down a comprehensive opinion which contained a summary of the evidence and adopted forty-two findings of fact and twenty conclusions of law. It appears on seventy-nine pages of the printed record. The District Judge found in favor of all the plaintiffs; that Gilchrist & Sons, the partnership, is entitled to recover $239,000 compensatory damages and $79,000 punitive damages making a total of $318,000; that G & R is entitled to recover compensatory damages in the amount of $20,000 and $7,000 punitive damages making a total of $27,000; that Snyder and Randolph is entitled to recover compensatory damages in the amount of $101,000 and $33,000 punitive damages making a total of $134,000. Judgments were entered in favor of the plaintiffs in accordance with these findings.

The partnership owned valuable leases on coal mining lands comprising about 37,750 acres in the Jellico area. It also owned mining machinery, equipment and facilities. It had been engaged in the mining and sale of coal for several years. G & R was organized as a corporation in 1957. It was a closed corporation. The members of the partnership were its principal officers, directors and shareholders. Shortly after its organization G & R entered in a contract with the partnership whereby the partnership agreed to furnish G & R with sites in the Jellico area for the strip mining of coal and also to furnish and maintain the necessary machinery, equipment and facilities therefor, G & R, for a stipulated price, agreed to strip mine and prepare the coal furnishing all labor and supervision therefor and to load the coal after preparation on the partnership's chosen method of conveyance. The partnership also subleased lands to G & R which in turn subleased to others for auger mining and deep coal mining. G & R subleased lands to Snyder & Randolph for auger mining. Snyder & Randolph entered into an agreement with the partnership to sell it all coal produced under the sublease and the partnership agreed to account for all sales less a commission of 5% for selling and 7½% for crushing and handling the coal. The coal mined by G & R and Snyder and Randolph was carried from the mines to tipples by independent truckers who were not employees of the plaintiffs.

Prior to the present controversy, G & R and its predecessor had signed the National Bituminous Coal Wage Agreement and various amendments with UMW. Some of its employees belonged to the Union, but a majority did not. The Union and the employees had little, if any, dealings and G & R paid the employees the same wages it paid its other employees engaged in road work without regard to Union pay scales and other conditions of employment. Snyder & Randolph had no contractual relationship with the Union although some of its employees were members.

In December 1958 UMW negotiated an amended wage agreement with certain coal operators and sent notice that any signers of the old agreement would be expected to sign the new amended agreement and the old agreement would be cancelled at the end of 60 days. G & R believed that it could not operate under the new amended agreement and refused to sign it. G & R notified UMW of its cancellation of the old agreement as of March 2, 1959. Snyder & Randolph likewise refused to sign the new agreement.

In February 1959, the agents and representatives of UMW began an intensive campaign in southeastern Kentucky and northeastern Tennessee to organize the field. They instructed G & R employees not to work after the old contract expired. They told Snyder & Randolph that if they did not sign the amended agreement "we will shut you down." They stated that they took orders from Washington and intended to use whatever means were needed to carry them out. They contacted truck owners and drivers and warned them not to deliver coal for G & R and Snyder & Randolph.

When peaceful persuasion failed other means were adopted. Truck drivers were stopped and ordered to dump coal in the street blocking the entrance to the tipple. Truckers were stopped in the streets and ordered to turn around and return to Jellico. A temporary restraining order was issued on April 30th by the United States District Court at London, Kentucky at the instance of the National Labor Relations Board restraining UMW from coercing or interfering with employees of the coal industry.

The federal court injunction did not stop the acts of violence which continued with unabated fury. On May 1, George Lindsey, a crusher operator of G & R was ambushed and shot at while on his way home after finding a barricade of trees and timbers on the public street which barred the path of his truck. Another employee was assaulted, beaten and rendered unconscious by the use of brass knuckles.

On May 2, an independent trucker hauling coal for Snyder & Randolph was ambushed. Two tires were shot and one bullet entered the cab of his truck. On May 3, the truck of George Bray was dynamited at his home at midnight. A dynamite explosion took place at the home of Arnold Spradlin a few days after he had begun hauling coal for Snyder & Randolph. At midnight on May 6, 1959 two tipples or crushers belonging to the partnership were wrecked by dynamite explosions occurring from one to five minutes apart and were of sufficient force to break windows on the main street in Jellico about a block away. On June 4 a railroad trestle serving the tipple of Snyder & Randolph at Verne, Kentucky was destroyed by dynamite. On June 16 a large Compton auger owned by Snyder & Randolph which cost about $90,000 was almost totally destroyed by dynamite.

The principal argument advanced by UMW, in its appeal, was that Gilchrist & Sons was not a party to the alleged secondary boycott and was not entitled to maintain an action under Section 303 of the Labor-Management Relations Act of 1947, 28 U. S. C. Sec. 187. It urges that it had no labor dispute with the employees of the partnership and were not attempting to organize them. UMW asserted other grounds of error, namely, that truck drivers engaged on a contract basis to haul coal mined by G & R were not "neutral" employees within the meaning of the Act; that the District Court had no jurisdiction to determine whether the evidence established a violation by UMW of the common law of Kentucky and Tennessee; that UMW could not be sued as an entity; that the District Court erred in holding UMW liable for damage to Gilchrist & Sons' tipple and Snyder & Randolph's auger; that the evidence does not support findings that UMW unlawfully interfered with and destroyed the business of Gilchrist & Sons, G & R and Snyder & Randolph; that the evidence does not justify the awards of damages to the several plaintiffs.

UMW relies on our decision in *Love and Amos* v. *United Mine Workers*, 279 F. 2d 716, certiorari denied 364 U. S. 881 in support of its contention that the partnership was not entitled to maintain an action in the District Court under the Labor-Management Relations Act of 1947. In that case Love and Amos had a verbal contract to sell coal for Osborne Mining Company for a commission. Love and Amos claimed damage not because of any activities of UMW directed against it, but on account of the destruction of the business of Osborne. Its theory was that it would have sold Osborne's coal and earned commissions if Osborne's business had not been destroyed by UMW. Love and Amos had sustained no direct damage by reason of any of the unlawful acts of UMW. Its damage was indirect and remote and not of the type contemplated to be remedied by the Labor-Management Act of 1947.

In the present case, the relationship between the partnership and G & R was much different than that existing between Love and Amos and Osborne Mining Co. The partnership here was a principal and not an agent. It had an established coal business and sold its own coal. It owned the leases, coal, mining, machinery, equipment and facilities. In fact, the partnership had an integrated coal business in which only the actual mining was delegated to an instrumentality (G & R) controlled by its members. Activities of UMW were directed at the partnership.

The damage sustained by the partnership was direct and not remote, indirect or incidental. Its physical property was damaged by the dynamiting. Its coal business was disrupted and destroyed. It did not claim damage because of the destruction of the business of G & R as in Love and Amos. In our opinion, the plain language of the Act "whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue . . ." authorized the suit by the partnership which was directly injured in its business and property by reason of the violation of the Act by UMW.

With respect to the other claims of error assigned by UMW, we are of the opinion that the findings of fact adopted by District Judge Robert L. Taylor were supported by substantial evidence and were not clearly erroneous. We would have no right to disturb them. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U. S. 278. Many of the legal questions raised by UMW were settled by our decisions in *Osborne Mining Co.* v. *United Mine Workers*, 279 F. 2d 716, certiorari denied 364 U. S. 881 and *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F. 2d 52, certiorari denied 359 U. S. 1013. The District Judge was familiar with these rules of law since he presided at the trial of the *Osborne Mining* and *Love and Amos* cases. These cases involved conduct somewhat similar to that in the cases at bar. We are satisfied that the District Judge correctly applied the rules of law with respect to the issues of liability and damage. In our judgment, the awards of damages to the plaintiffs were not beyond the permissible limits of his discretion and were not excessive.

The judgments in both cases are affirmed.

Labor Management Relations Act, 1947

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or

manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. 185. *Suits by and against labor organizations—Venue, amount, and citizenship*

* * *

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Norris LaGuardia Act

29 U.S.C. 106, 47 Stat. 71: *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents*

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

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UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE,
Trustee for Robert A. Gilchrist, a minor, Partners, d/b/a Gilchrist & Sons; and G & R Coal Co., Inc.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

SNYDER AND RANDOLPH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Section 303(b) 2, 22, 23, 24, 27, 28

Revenue Act of 1926, § 302(d) 23

Sherman Act, Section 4 ..... 22-23, 24

29 U. S. C. A. Section 159 10

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93 Congressional Record, May 9, 1947, 4843-46, 4858, 4872-73 23

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 213.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE,
Trustee for Robert A. Gilchrist, a minor, Partners, d/b/a Gilchrist & Sons; and G & R Coal Co., Inc.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

SNYDER AND RANDOLPH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents William G. Gilchrist, Jr., William G. Gilchrist, III, and James Blythe, Trustee for Robert A. Gilchrist, a minor, Partners, d/b/a Gilchrist & Sons; G & R Coal Co., Inc.; and Snyder and Randolph, Inc., in opposition to the petition for writ of certiorari filed herein, respectfully represent:

OPINION BELOW.

The Sixth Circuit s opinion, appearing in the Appendix to the Petition, is reported in 290 F. 2d 36.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED.

The statutes involved are correctly set forth in the Appendix to the Petition.

QUESTIONS PRESENTED.

1. Where the widespread and violent activities of a union had a pronounced effect and impact upon the employees of neutral employers, and were intentionally designed to induce and influence such employees to concerted action, were those activities violative of Section 303 of the Labor-Management Relations Act, 1947, or were such activities primary and protected merely because a substantial number of such events took place on the streets and highways near the business situs of a primary employer?

2. May a partnership, though claimed by the Petitioner not to have been an employer of employees primarily or secondarily involved in a labor dispute, assert an action based upon a secondary boycott violative of the Act's Section 303(b) where, as factually found by the trial court and the appellate court, the Petitioner's activities were directed against such partnership and it suffered direct damage to its business and property thereby?

3. In an action under Section 303 of the Act against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain actions which occurred during the dispute constituted

violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiff's businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

4. Where a strike designed to prevent the production and sale of coal by operators not affiliated with the striking union is marked by frequent and substantial incidents of property damage and destruction, is the trial court's factual finding of union liability for damages to plaintiffs' property by clandestine use of explosives, based upon circumstantial evidence, and concurred in by the appellate court, so exceptional in character and so clearly erroneous as to be the proper subject of review by this Court on certiorari?

STATEMENT OF THE CASE.

The Facts.

Petitioner's statement of the factual background of this litigation, respondents believe, amounts to inaccuracy and omission in the composite portrayal of what actually occurred. Accordingly, the respondents feel justified in presenting a brief and accurate description of that background. This has been done so concisely by the Court of Appeals that it would appear sufficient to demonstrate that the record fully supports that resumé, thus:

"The partnership (Gilchrist & Sons) owned valuable leases on coal mining lands comprising about 37,750 acres in the Jellico area (R. 148-151). It also owned mining machinery, equipment and facilities (R 166, 188). It had been engaged in the mining and sale of coal for several years (R. 148). G & R was organized as a corporation in

1957 (R. 154). It was a closed corporation. The members of the partnership were its principal officers, directors and shareholders (R. 162-165). Shortly after its organization G & R entered in a contract with the partnership whereby the partnership agreed to furnish G & R with sites in the Jellico area for the strip mining of coal and also to furnish and maintain the necessary machinery, equipment and facilities therefor. G & R, for a stipulated price, agreed to strip mine and prepare the coal furnishing all labor and supervision therefor and to load the coal after preparation on the partnership's chosen method of conveyance (Pl. Ex. 20; R. 159, 1188-1191). The partnership also subleased lands to G & R which in turn subleased to others for auger mining and deep coal mining (R. 193). G & R subleased lands to Snyder & Randolph for auger mining (Pl. Ex. 53; R. 196, 1199-1204). Snyder & Randolph entered into an agreement with the partnership to sell it all coal produced under the sublease and the partnership agreed to account for all sales less a commission of 5% for selling and 7½% for crushing and handling the coal (Pl. Ex. 54; R. 196-197, 1204-1206). The coal mined by G & R and Snyder and Randolph was carried from the mines to tipples by independent truckers who were not employees of the plaintiffs (R. 193-194).

"Prior to the present controversy, G & R and its predecessor had signed the National Bituminous Coal Wage Agreement and various amendments with UMW (R. 206). Some of its employees belonged to the Union, but a majority did not (R. 226). The Union and the employees had little, if any, dealings and G & R paid the employees the same wages it paid its other employees engaged in road work without regard to Union pay scales and other conditions of employment (R. 191-192). Snyder & Randolph had no contractual relationship with the Union although some of its employees were members (R. 726-727).

"In December 1958 UMW negotiated an amended wage agreement with certain coal operators and sent notice that any signers of the old agreement would be expected to sign the new amended agreement and the old agreement would be cancelled at the end of 60 days (R. 873-874). G & R believed that it could not operate under the new amended agreement and refused to sign it (R. 208). G & R notified UMW of its cancellation of the old agreement as of March 2, 1959 (R. 208, 821). Snyder & Randolph likewise refused to sign the new agreement (R. 730-732).

"In February, 1959, the agents and representatives of UMW began an intensive campaign in southeastern Kentucky and northeastern Tennessee to organize the field (R. 873-875). They instructed G & R employees not to work after the old contract expired (R. 419-420). They told Snyder & Randolph that if they did not sign the amended agreement 'we will shut you down.' They stated that they took orders from Washington and intended to use whatever means were needed to carry them out (R. 730). They contacted truck owners and drivers and warned them not to deliver coal for G & R and Snyder & Randolph (R. 375, 377, 586, 643-645).

"When peaceful persuasion failed other means were adopted. Truck drivers were stopped and ordered to dump coal in the street blocking the entrance to the tipple (R. 215, 665-668). Truckers were stopped in the streets and ordered to turn around and return to Jellico (R. 370, 380). A temporary restraining order was issued on April 30th by the United States District Court at London, Kentucky at the instance of the National Labor Relations Board restraining UMW from coercing or interfering with employees of the coal industry (Pl. Ex. 58; R. 1207-1211).

"The federal court injunction did not stop the acts of violence which continued with unabated fury. On May 1, George Lindsey, a crusher operator of G & R was am-

bushed and shot at while on his way home after finding a barricade of trees and timbers on the public street which barred the path of his truck (R. 448-449). Another employee was assaulted, beaten and rendered unconscious by the use of brass knuckles (R. 483). On May 2, an independent trucker hauling coal for Snyder & Randolph was ambushed. Two tires were shot and one bullet entered the cab of his truck (R. 807). On May 3, the truck of George Bray was dynamited at his home at midnight (R. 643-644). A dynamite explosion took place at the home of Arnold Spradlin a few days after he had begun hauling coal for Snyder & Randolph (R. 347-348). At midnight on May 6, 1959 two tipples or crushers belonging to the partnership were wrecked by dynamite explosions occurring from one to five minutes apart and were of sufficient force to break windows on the main street in Jellico about a block away (R. 227, 495). On June 4 a railroad trestle serving the tipple of Snyder & Randolph at Verne, Kentucky was destroyed by dynamite (R. 743). On June 16 a large Compton auger owned by Snyder & Randolph which cost about $90,000 was almost totally destroyed by dynamite" (R. 743-744). (Record reference supplied.)

SUMMARY OF ARGUMENT.

1.

Petitioner's contention that all of its activities were confined to "entrances" to G & R job sites, and therefore not violative of § 303 of the Labor-Management Relations Act, not having been presented in either of the courts below, does not present such an exceptional situation as to warrant review by certiorari. Further, the factual situation involved in this action differed so completely from the facts in those cases upon which petitioner relies, it cannot be validly contended there is any conflict in the decision in this case with those in the opinions cited by petitioner.

2.

Gilchrist & Sons, being one of the targets of petitioner's attacks, being directly injured by the activities of petitioner, and being the owner of property and principal participant in the business destroyed by petitioner, was entitled to maintain an action for damages under § 303 of the Act.

3.

The doctrine of pendent or ancillary jurisdiction is one of general application, and there is no valid reason why it should not be applied to suits under § 303 of the Act.

4.

The responsibility of petitioner for damage to the physical properties of the respondents was essentially a question of fact, concurred in by both lower courts, the findings of which demonstrate no obvious or exceptional error requiring review by this Court.

THE ARGUMENT.

Question No. 1.

Determination by Lower Courts that Activity of Petitioner was Within Proscription of Section 303 of the Act Does Not Present a Conflict of Decision Requiring Review.

Reduced to simplicity, it is petitioner's argument that all of its activities were "primary," as distinguished from "secondary," and therefore in no instance violative of § 303 of the Labor Management Relations Act, 1947 (29 U. S. C. 187). Petitioner asserts that the decision in the instant case is in conflict with decisions of both this Court and of other Circuits. The basis of this assertion is the claim that activities of petitioner were confined to the "entrance" to the mine site of G & R and to the Gilchrist tipple where G & R processed and loaded coal. Therefore, petitioner declares, the activity at each location was primary, and the fact that it induced employees of neutrals not to haul or produce coal did not bring such activity within the proscription of § 303. This is the first time that this argument has been presented in these cases.

In the District Court the petitioner contended that it did not induce or encourage employees of employers other than plaintiffs to engage in conduct proscribed by § 303; that neither the truck owners who hauled the coal nor the underground miners were neutral employers or employees of neutral employers; and that its activities were primary as to all employees in that it was seeking to organize all employees involved, including the employees of the truckers and underground miners (R. 45, 65). In the Court of Appeals its defense that its activities did not come within the secondary boycott provisions of § 303 was reduced to the single contention that the truck drivers

engaged on a contract basis to haul coal mined by G & R were not neutral employees within the meaning of the provisions of said section (Petition for Writ, 5a).

The petitioner is asking this Court to hold that the lower courts were in error on a point that was never presented to either court for a decision. To comply with such request is to nullify the duties and services to be performed and rendered by the district courts and courts of appeal in the Federal judicial system. To avoid such a circumvention of the Federal judicial processes, and to prevent the overwhelming flow of appeals which would otherwise result, this Court has frequently stated that it sits as a court of review and that it is only in exceptional cases that it will review a question not raised in the court below. *Lawn v. United States*, 355 U. S. 339, 362, 78 S. Ct. 311, 2 L. Ed. 2d 321; *Duignan v. United States*, 274 U. S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996; *Husty v. United States*, 282 U. S. 694, 701, 702, 51 S. Ct. 240, 75 L. Ed. 629. The respondents submit that the instant cases are not such exceptional ones as to warrant review by this Court on certiorari of this newly-raised question.

Petitioner relies principally upon the opinions of this Court in *NLRB v. International Rice Milling Co.*, 341 U. S. 665, and *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*, 366 U. S. 667. The activity of the petitioner is described and referred to as merely "picketing," and the location of such activity is repeatedly fixed as being at the "entrance" of the coal tipple and at the "entrance" of the mine. However, no amount of strained terminology can convert the facts of these cases into the factual patterns of the two cases relied upon by the petitioner. A reference to the factual findings contained in the opinions of either of the lower courts immediately dispels the tailored cloak of similarity. Such

a reference will bring into immediate focus the close resemblance between the facts in the instant cases and the facts in the cases of *United Mine Workers of America v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881, and *United Mine Workers of America v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013. There, as here, violence was the hallmark of the activities of the union; there, as here, the union's method of attaining its objectives was to instill fear in the employees which it sought to induce and influence to concerted action. As in the *Osborne* case, the union activities pervaded the general area and showed a pattern of property destruction and abuse of persons at points other than the situs of the primary employer.

The petitioner admitted that it had not been designated as a representative of the employees of the respondents under the provisions of Title 29, U. S. C. A., § 159 (R. 30, 32-33). The union field representatives were seeking to persuade the non-union operators in the vicinity of Jellico, Tennessee, to sign the new contract (R. 874, 875, 925). They enlisted the active help of several union members as assistants, who were very appropriately termed "lieutenants" by the District Court (R. 108). The new contract contained a so-called "protective wage" clause, the effect of which was to prohibit a signatory to the contract from acquiring or handling coal produced by non-union operators and miners, or from leasing any coal lands to them (R. 728, 929). The field representatives and their lieutenants sought to accomplish the union objectives by preventing the independent truckers from transporting coal from the producing mines to the tipples where the coal was processed and shipped (R. 208, 214, 285, 375, 377, 422, 423, 586, 611, 645, 668, 669). It was because of the "protective wage" clause, that S & R

wanted to see whether or not Gilchrist & Sons and G & R signed the new contract (R. 728). The coal which S & R was mining was sub-leased to it by G & R and was being processed, shipped and sold by Gilchrist & Sons over their tipple. If Gilchrist & Sons and G & R signed the new contract, then S & R would necessarily have had to sign the contract, or to have given up its contracts with Gilchrist & Sons and G & R.

While the petitioner insists that its activities in the instant cases consisted of "picketing" at the "entrance" of the processing tipple and at the "entrance" of the G & R mine, the evidence does not show that its activities were so limited. The Jellico tipple of Gilchrist & Sons was located in the town of Jellico, and the evidence shows that a part of the activities of the union consisted of a display of force by numbers upon the streets of Jellico and that the employees of independent truckers were stopped on the streets of Jellico (R. 216, 282, 283, 406, 407, 417, 586, 611, 615, 643, 645, 654, 666-669, 736). The field workers, their lieutenants and pickets were at the entrance of the G & R mine on only one occasion, and that was the time when they went to the strip pit and by display of force, threats and abuse closed down the mining operation (R. 403, 405, 424-427, 532, 538). However, on numerous other occasions, the field representatives and their assistants intercepted the employee-drivers of the independent truckers at a point on the public highway about two miles distant from the G & R mine; it was at this point that they stopped the trucks, threatened the drivers, forced them to turn their trucks around and return to Jellico (R. 370, 380), and told them that there would be no more coal hauling until the new contract was signed (R. 370, 375). The employees of truckers who were hauling coal for S & R were intercepted on the streets of Jellico at a point approximately six

miles from the S & R mine (R. 586, 666-669). Truckers who persisted in attempting to haul coal to the tipple of Gilchrist & Sons had their trucks dynamited at their homes (R. 347, 644), and shot into on the highways (R. 807). Employees of truckers who were hauling coal from the small deep mines to the partnership tipple were also induced and influenced to concerted refusal to transport coal because of the widespread and violent activities of the petitioner (R. 610, 611, 615, 616).

Rice Milling was based entirely upon one isolated incident. Two employees of a neutral customer were turned back by pickets as they approached the struck mill. This Court decided the one event did not amount to an inducement of neutral employees to concerted action, saying:

> "While each case must be considered in the light of its surrounding circumstances yet the applicable proscriptions of § 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer.
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> * * * * *
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> "The limitation of the complaint to an incident in the geographically restricted area near the mill was significant although not necessarily conclusive.
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> "A union's inducements or encouragements reaching individual employees of neutral employers *only as they happen to approach* the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore such actions do not come within the proscriptions of § 8(b)(4), and they do not here."

Petitioner's present argument, not presented in the District Court nor Court of Appeals, really flowers from petitioner's interpretation of the Court's opinion in *Local*

761, International Union of Electrical, Radio & Machine Workers v. NLRB, 366 U. S. 667. A brief resumé of that opinion appears to be appropriate.

Involved was General Electric's thousand-acre Appliance Park near Louisville. This situs had five entrances (over culverts) called gates. GE had designated Gate 3-A for the use of employees of independent contractors, and had forbidden its own employees to use it. During a strike of a majority of GE's employees, all gates, including 3-A, were picketed. This Court considered it significant enough to point out that there was no contention the picketing "was other than peaceful in nature" (p. 670). In its decision of whether or not the peaceful picketing at Gate 3-A was violative of the Act, this Court said (p. 672) § 8(b)(4)(A) "could not be literally construed; otherwise it would ban most strikes historically considered to be *lawful*, so-called primary activity. * * * Congress did not seek by § 8(b)(4), to interfere with the ordinary strike * * *." (Emphasis ours.)

The Court observed that all picketing is motivated, at least in part, by the *hope* that all persons, including the employees of third parties, will respect the picket line and thereby exert some outside pressures on the struck employer. "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer."

Noting that "the distinction between legitimate 'primary activity' and banned 'secondary activity' * * * does not present a glaringly bright line" (p. 673), the Court reviewed the history of the Board's interpretation of § 8(b)(4)(A) in light of "unfolding variant situations." It is said (p. 674):

> "* * * the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although no rigid rule which would make * * * a few factors conclusive is contained in or deducible from the statute, * * * In the absence of admissions by the union of an illegal intent, the nature of the acts performed shows the intent."

The Court pointed out that early decisions made the location of the activities the standard by which picketing was determined to be primary and permissible, or secondary and prohibited. However, the complexities arising from the "protean forms" of conduct required a more flexible standard, the Board realizing "There must be a balance between the Union's right to picket and the interest of the secondary employer in being free from picketing."

The facile geographical standard was abandoned, and (p. 679) "In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in Rice Milling, in which we indicated that the location of the picketing at the primary employer's premises was 'not necessarily conclusive' of its legality." The Court said (pp. 680, 681) in this case "the precise nature of the issue * * * is whether the Board may apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employers' premises. The effect of such a holding would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer. Of course, an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause * * *.

* * * * *

"The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on *traditional primary* activity of appealing to neutral employees whose tasks aid the employer's everyday operations. The 1959 Amendments to the National Labor Relations Act, which removed the word 'concerted' from the boycott provisions, included a proviso that 'nothing contained in this clause (B) shall be construed to make unlawful, *where not otherwise unlawful*, any *primary* strike or *primary* picketing.'" (Emphasis ours.)

As this Court has observed, it is unlikely that any amount of dissection and analysis will supply a neat, simple and infallible formula for distinguishing the "fine line" between primary and secondary activity. Inherent within the dual Congressional objectives are the flow of conflicting forces and contradictory goals. Nevertheless, certain principles have evolved.

The location of the activity may be significant, but it is certainly not conclusive.

The test consists of examining conduct and objectives.

The right of unions to "publicize" their cause must be preserved. This is "traditional primary activity," or an "ordinary strike."

Such traditional primary activity does not become prohibited merely because picketing is done in the "hope" that other employers and employees will be influenced to action "only as they happen to approach the picketed place of business."

Conspicuously absent from these generalities is any sanction of the use of violence as a traditional or protected activity. Primary activity does not become secondary because it is violent, but neither is it a protected course of conduct, and this Court has noted that "the nature of the acts performed shows the intent."

A condensed pandect of this Court's enunciations relevant to this question could fairly include: (1) Inducement or encouragement which naturally and incidentally results from peaceful and traditional picketing is not proscribed by the Act merely because the picketing union hopes for such result, and can therefore be said to have it as an objective. (2) This is true of peaceful picketing at a primary employer's job site not used by the struck employer's employees, but used by neutral employees performing work necessary to the normal operations of the business. (3) On the other hand, deliberate and intentional inducement of the employees of neutral persons to a concerted action, with the aggressive and immediate purpose of involving neutral parties, and through them exerting pressure upon the primary employer, is prohibited, regardless of where it takes place. (*NLRB v. Denver Building & Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB*, 341 U. S. 707.)

As demonstrated by the Court of Appeals' review of the evidence (unchallenged by petitioner), this was not a

case where the union limited itself to peaceful and traditional picketing in the hope that third persons would be influenced as they happened to approach the picket line. On the contrary, the petitioner's adherents saw to it that neutrals would be not only influenced, but dissuaded from doing any business with the primary employers who were the objects of its activity. It activated its members not only in the vicinity of the Jellico tipples, but on the public highways two miles away from any job site of any employer, on the streets of Jellico generally, and even to the home of neutral employees still willing to risk lawful work in the face of an organized belligerence. It did not *hope* that truck drivers of neutral employees would be influenced. It intercepted the truck drivers, told them in no uncertain terms not to return with any more coal, and to convey the message to other truck drivers to respect the same injunction, which was done (R. 586-587). The union was not soliciting the driver to become a member (R. 587). These flagrant violations of law were not only vigorous, but effective. It was made clear that trucking employees were subjected to violence and intimidation which induced them to concerted action against their neutral employer, even while employees of S & R continued their efforts to produce coal (R. 734-736). This was in fulfillment of a promise to the president of S & R that the petitioner would shut down his operation "by any means that is required" (R. 730). Further, a part of this activity was carried on at the Gilchrist tipples in Jellico, miles away from S & R's site of operation, at a time when the tipples were being operated for the sole purpose of processing and loading S & R's coal (R. 222-223).

It is suggested that the S & R case "presents another of the protean forms of activity that may arise" because the petitioner "was engaged in a dispute with two em-

ployers simultaneously." As is obvious from the record, the petitioner was engaged in a dispute with dozens of employers, and with everyone who presented an obstacle to its avowed intent to bring into its fold every operator in the area who had not signed its contract (R. 874).

It was certainly not engaged in the innocuous publicizing of its cause when its two principal proponents sallied forth in the middle of the night because they heard that S & R was going to operate a night shift; went to the Gilchrist tipple in Jellico; and there intercepted a truck driver, the employee of a complete neutral, and made him dump his coal out into the street in such fashion that it blocked the entrance to the tipple (R. 215, 665-668). Not only so, but they waited in the neighborhood for another anticipated driver so that he might be subjected to the same treatment (R. 846).

The petitioner asserts that "nothing in the circumstances indicates any * * * intent or object" to cause "S & R to cease doing business with Gilchrist and Sons." To refute this contention, the Court is respectfully referred to a record which shows the contrary (R. 208, 214, 221, 287, 288, 304).

There is no conflict in the decision in the instant cases and the cited decisions. In an effort to show that the Court of Appeals was in error, the petitioner quotes from the opinion of that Court in the *Osborne* case; it is, of course, unable to quote from the opinion in the present cases as this question was not presented to the lower court for decision and it is nowhere mentioned in the opinion. Yet, petitioner urges that it is upon this question that the decision in respondents' cases conflicts with the decisions of this Court and with the decisions of other Courts of Appeals.

In the course of this phase of its argument, petitioner makes the statement that the District Court for the Eastern District of Kentucky, where a number of cases are pending against the petitioner arising out of its 1959 activities, indicated "on June 26, 1961, that there would be no further adjudication until further clarification by this Court in the instant cases." Kentucky counsel for respondents know of no such indication having been given by the district court referred to; however, counsel do know that they have such a case assigned for trial in that court on October 2, 1961, and that they are making full preparation for the trial of same on that date. They also know that Kentucky counsel for the petitioner are proceeding with pre-trial discovery for the trial of other cases on the docket in that district court.

As is evident from the record, from the findings of the District Court, and from the resumé by the Court of Appeals, the petitioner is now in difficulty because its agents and representatives launched a vicious and violent campaign to force recognition from every coal operator in the district. It pursued this objective with a reckless disregard of the identity, function or relationship of the persons whom it involved. It announced its intent to close down the operations of the respondents by whatever means were found necessary, and it fulfilled that promise by violence, intimidation and serious property damage.

It is respectfully submitted that this is not the type of traditional union activity which the Congress has enjoined upon the courts to protect and preserve, nor has this Court ever so indicated.

Question No. 2.

Determination by Lower Court That Partnership Was Entitled to Maintain an Action Under Section 303 of the Act is Correct.

The lower courts made concurrent findings of fact that the petitioner's activities were directed against Gilchrist & Sons as well as against G & R and S & R, and that they suffered direct damage to their business and property as a result of such activities. However, petitioner contends that the lower courts were in error in holding that the partnership could invoke jurisdiction under Section 303 of the Act in seeking recovery for such damage, giving as its reasons that such a holding conflicts with Congressional intent in the enactment of § 303 and conflicts with the Court of Appeals' own decision in *United Mine Workers of America v. Love and Amos Coal Company*, 6 Cir., 279 F. 2d 716.

Petitioner says there is no distinction between the relationship of Gilchrist & Sons to G & R and the relationship of Love and Amos to Osborne Mining Company, and upon this false premise its argument of conflict of decision is made. Love and Amos was a coal sales agency with offices in a city distant from the coal mining area of Osborne Mining Company. There it engaged in the business of selling coal upon a commission basis, of various coal mining companies, including the coal of Osborne Mining Company. In fact, this same Love and Amos was one of the coal sales agencies handling the sale of the coal of Gilchrist & Sons in this case (R. 204). To say that Gilchrist & Sons in the present case occupies the same comparative position as that occupied by Love and Amos in the *Love and Amos* case cannot be supported by the record.

The over-all coal mining operation in the present case was that of Gilchrist & Sons. The part played by G & R

in this operation was not a separate and distinct function which could be carried on separate and apart from the activities of Gilchrist & Sons in the over-all operation. To the contrary, G & R furnished a service in the integrated operation in which it was engaged with Gilchrist & Sons. The contract between Gilchrist & Sons and G & R clearly shows that G & R was merely furnishing the necessary labor, and supervision over this labor, to mine and produce coal belonging to the partnership, and to provide for its delivery into the railroad cars at the processing tipples of the partnership. The coal which G & R mined for the partnership was the coal of the partnership while in the ground and at all other times. The machinery and equipment used by G & R in mining the coal was furnished by the partnership and was maintained by the partnership. The partnership furnished the necessary repair parts, and furnished the fuel, grease and lubricating oil required in the operation of the equipment (R. 1188-1191). The partnership provided the processing ramps or tipples over which the partnership coal was processed and loaded into railroad cars by labor supplied by G & R.

The partnership and G & R occupied joint offices near the site of the processing plants. These offices were furnished at the expense of the partnership, which not only paid the rent, but supplied at its own expense the utilities and telephone service (R. 259). An office manager and bookkeeper had general supervision of the common offices and of the books and records for both companies, and his entire services were paid for by G & R (R. 247, 248). A secretary and bookkeeping assistant, who did secretarial work and bookkeeping work for both companies, had her entire services paid for by the partnership (R. 276). William G. Gilchrist, Jr., who devoted his full time to the over-all supervision of the coal mining operations, and his

son, William G. Gilchrist, III, who devoted a part of his time to assisting his father in the over-all supervision of the coal mining operation, were both paid by the partnership and received no compensation from G & R (R. 165, 235).

G & R, for supplying the labor and supervision to strip mine the coal and place it in the railroad cars, was paid a fixed price per ton. It did not receive any part of the proceeds of the sale of the coal, and had nothing to do with the sale of same (R. 204). The partnership arranged for the sale of the coal, selling it through various coal sales agencies throughout the country, including Love and Amos, which coal sales agencies charged Gilchrist & Sons the usual sales commission. Gilchrist & Sons retained the full sales proceeds received by the sales (R. 183, 187, 275).

In the light of these facts, it is difficult to understand how the petitioner can seriously urge the Court that the relationship between Gilchrist & Sons and G & R corresponds to that of Love and Amos Coal Company and Osborne Mining Company, and that, therefore, the present decision conflicts with the decision in the *Love and Amos* case. To the contrary, it clearly appears from the undisputed facts that Gilchrist & Sons were directly affected and injured by the secondary boycott activities of the petitioner, and that it was within the target areas against which the petitioner was directing such activities, and that the injury and damage which it sustained as a result of such activities are separate and apart from the injury and damage sustained by G & R, and both lower courts so held.

Petitioner's contention that the present decision is in conflict with the Congressional intent in the enactment of § 303 is based upon Congressional history of the Act indicating that the participating members of Congress were conscious that the provisions of § 303(b) paralleled § 4 of

the Sherman Act, and that recovery should have been denied to Gilchrist & Sons under the cases construing § 4 of the Sherman Act. In *United Brick & Clay Workers v. Deena Artware*, 6 Cir., 198 F. 2d 637, the Court of Appeals refused to adopt a restricted construction of § 303(b). The court pointed out that Congress made a secondary boycott illegal by the enactment of the Labor-Management Relations Act of 1947, and, further, that (p. 644) "In doing so it used the broad and inclusive language 'Whoever shall be injured.' The legislative history was that Congress was aware of the broad coverage provided by this phrase. 93 Congressional Record, May 9, 1947, 4843-46, 4858, 4872-73. If it had intended to limit the right of action to innocent third-party employers, it could easily have done so. If Congress considered the use of the secondary boycott in a labor dispute as unfair labor practice and illegal, as it did by the enactment of the Labor-Management Relations Act of 1947, it was entirely consistent with such decision to give a right of action to anyone who was injured in his business by a violation of the law thereafter." In conclusion, the court stated that (p. 644) "We are of the opinion that in the present case the word 'whoever' has a plain, unambiguous meaning which we are not authorized to disregard and as so construed it includes the Appellee." One of the cases cited in support of this opinion is that of *Helvering v. City Bank Farmers Trust Company*, 296 U. S. 85, 88-89, wherein Justice Roberts, in interpreting the phrase "any person" as used in § 302(d) of the Revenue Act of 1926, stated (p. 89), "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." The decision in the *Deena Artware* case is certainly consistent with the decision in the present case.

The petitioner would have the Court construe § 303 (b) in the light of certain particular cases construing § 4 of the Sherman Act. These selected cases are not analogous to the type of relationship which existed between Gilchrist & Sons and G & R. In interpreting that part of § 4 of the Sherman Act providing "* * * any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States * * *," the courts, while recognizing that "the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of wrongful acts" (*Clark Oil Company v. Phillips Petroleum Company*, 8 Cir., 148 F. 2d 580, 582), have continually approached this problem from a point of view limited by the declaration that the "right which (the anti-trust laws) give to a person to recover three-fold the damages he has sustained, is an unusual one, the remedy is drastic, and the Acts are to be strictly construed and not to be enlarged by construction." *Image and Sound Service Corporation v. Altec Service Corporation*, D. C. Mass., 148 F. Supp. 237, 239. The courts have been constantly on the alert to withhold recovery "from those who seek the windfall of treble damages, because of incidental harm." *Conference of Studio Unions v. Loew's, Inc.*, 9 Cir., 193 F. 2d 51, 55. However, even under this restricted construction of § 4 of the Sherman Act, the courts have authorized recovery by persons not in privity with the wrongdoer where they met the test of direct injury to their property, or to an established business in which they had an interest or had a right to continue to expand without unlawful interference by the wrongdoer. *McWhirter v. Monroe Calculating Machine Company*, D. C. Mo., 76 F. Supp. 456; *Midland Oil Company v. Sinclair Refining Company*, D. C. Ill.,

41 F. Supp. 436; *Roseland v. Phister Mfg. Company*, 7 Cir. 125 F. 2d 417; *Karseal Corporation v. Richfield Oil Company*, 9 Cir., 221 F. 2d 358, 271 F. 2d 709, 361 U. S. 961.

The *Karseal* case, *supra*, is particularly illustrative of the principle that a remedy is afforded to those who are directly injured, even though they were not directly involved in the proscribed activity. Karseal was a manufacturer of wax, selling it to independent distributors, who in turn were prevented or impeded in selling it to independent Richfield service stations by reason of Richfield's requirement that the station operators handle only products sponsored by Richfield. There the pressure was upon the independent retailer. Karseal was two steps removed from the monopolistic pressure. Nevertheless, Karseal was permitted to recover, the Court concluding (p. 365):

> "The Congress in the Clayton Act, stated in Sec. 4 'Any person who shall be injured * * * may sue * * *.' The Congress did not attempt to limit the relief to those manufacturing or distributing."

The basic goal of Prater and Daniel during the course of the activities in which they were engaged on behalf of the union during this period was to persuade all of the coal companies in their area who had not signed the new wage agreement, to sign (R. 208, 214, 278, 873, 874). The most effective way for them to shut down these reluctant coal companies and to bring persuasive pressure upon them was the way that they adopted; that is, to close down the coal tipples and ramps so that there would be no place to take the coal after it was mined. Prater and Daniel and their lieutenants concentrated their efforts, primarily upon keeping the coal tipples shut down, including the tipples of Gilchrist & Sons, and on stopping the trucks from transporting the coal from the mining

sites to the coal tipples, including the tipples of Gilchrist & Sons. If they could prevent any coal from being shipped out of their area, then the coal companies would have to either sign the contract or go out of business. The union was not satisfied with coercing or intimidating the employees working on the coal tipples, or the drivers operating the trucks, but proceeded to damage and destroy the tipples and the trucks also. Certainly, Gilchrist & Sons and their business and property were within the "target area" aimed at by Prater and Daniel in the conduct of these activities. Not only aimed at, but hit.

In the case of *United Mine Workers v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, the relationship between Meadow Creek Coal Company and Tennessee Coal Company was almost identical with that of Gilchrist & Sons and G & R. This relationship is described on pages 56 and 57 of the opinion of the court in the *Meadow Creek* case, as follows:

> "On account of the apparent animosity of the appellant toward appellee's president, the appellee company decided to organize a new company to operate the mine and deliver coal to appellee, in railroad cars or trucks, at the mouth of the mine. To consummate this, a corporation known as 'Tennessee Coal Company' was organized under the laws of Tennessee. This new company entered into a contract with Meadow Creek Coal Company under the terms of which the new corporation would use the equipment of appellee to mine the coal and deliver it to appellee as planned. Appellee contracted to pay the Tennessee Coal Company the actual cost of mining the coal, plus ten cents per ton.
>
> "It was agreed that the coal, both in the ground and at all times, belonged to appellee; and that the Tennessee Coal Company had only the right to mine

> and produce it. Appellee sold the coal and received all proceeds from sales. * * * Appellee rendered aid to the Tennessee Coal Company in its mining and production operation and paid salaries to some of its administrative officers and employees."

As to whether or not the issue of the right of Meadow Creek to maintain their action under § 303(b) was raised before the District Court, we do not know; but, evidently, the District Court found it necessary to make findings of fact on the relationship between Meadow Creek and Tennessee Coal Company, and these findings were of sufficient importance to be incorporated in the opinion of the Court of Appeals, and, under such factual situation, Meadow Creek was allowed to successfully maintain its action.

In the case of *Curto v. Int'l Longshoremen's & W. Union*, D. Ore., 107 F. Supp. 805, aff'd sub nom., *Int'l L. & W. Union v. Hawaiian Pineapple Co.*, 9 Cir., 226 F. 2d 875, cert. denied 351 U. S. 963, recovery was allowed to Hawaiian Pineapple Company against the Longshoremen's Union under § 303 of the Act even though the union was only attempting to prevent Pineapple from unloading its cargo and was not engaged in a dispute with Pineapple nor with anyone with whom Pineapple had dealt or was dealing in loading, transporting and unloading of the cargo. In passing upon motions for a new trial, the District Court stated that the evidence showed that (p. 812):

> "The object of the longshoremen was to isolate the cargo and prevent it from being handled by anyone and particularly transported. Therefore, it was one of the objects of the action to force or require the other persons and corporations to cease dealing with Pineapple and to cease dealing with others. Not only was this the object of the compulsion, but it was effective. But the statute only required that this be one of the objects."

The evidence is clear in the present case that the defendant union effectively moved to boycott the receiving and processing of coal at and over the tipples of Gilchrist & Sons, compelling the partnership to cease dealing with any and all persons who were bringing coal there, all for the purpose of bringing pressure on the coal companies and operators who had failed or refused to sign the new wage agreement. A complete stoppage and destruction of these business relationships resulted to the partnership as a direct and proximate result of these activities of the union, for which it is entitled to recover, as provided for by § 303 (b) of the Labor-Management Relations Act.

As so accurately and clearly stated by the Court of Appeals (Appendix to Petition, 6a):

> "The damage sustained by the partnership was direct and not remote, indirect or incidental. Its physical property was damaged by the dynamiting. Its coal business was disrupted and destroyed. It did not claim damage because of the destruction of the business of G & R as in Love and Amos. In our opinion, the plain language of the Act 'whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue * * *' authorized the suit by the partnership which was directly injured in its business and property by reason of the violation of the Act by UMW."

Question No. 3.

Application of Doctrine of Ancillary or Pendent Jurisdiction in Present Cases Is Not in Conflict With Congressional Intent in Enactment of § 303 of Act.

Despite adverse rulings in the recent cases of *United Mine Workers of America v. Meadow Creek Coal Company*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, and *United Mine Workers of America v. Osborne Mining Company, Inc.*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881, where this identical contention was argued at length, the petitioner continues to insist that actions under § 303 of the Labor-Management Relations Act of 1947 should be an exception to the doctrine of ancillary or pendent jurisdiction. The *Meadow Creek* and the *Osborne* cases were preceded by a long line of cases which had their origin in *Siler v. L & N Ry. Co.*, 213 U. S. 175, and *Hurn v. Oursler*, 289 U. S. 238. In applying this jurisdictional doctrine, the party against whom it is applied usually makes the contention that the case involved should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler, supra*, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, at page 245 of the opinion, as follows:

> "The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

Since this precise question was recently presented to this Court in the *Osborne* case, *supra*, wherein counsel for respondent ably demonstrated that the doctrine of an-

cillary or pendent jurisdiction is "a rule of general application," we again call to the Court's attention the authorities cited in that case. The doctrine now questioned by petitioner has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn v. Oursler, supra; Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *in re Amtorg Trading Corp.*, 75 Fed. 2d 826 (Ct. of Patent App., 1935); *Edelman & Co. v. AAA Specialty Company*, 88 Fed 2d 852 (7th Cir., 1937); *Sinko v. Snow-Craggs Corporation*, 105 Fed. 2d 450 (7th Cir., 1939); *Maternally Yours v. Your Maternity Shop*, 234 Fed. 2d 538 (2nd Cir., 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with an admiralty claim in such cases as *Jordine v. Walling*, 185 Fed. 2d 662 (3rd Cir., 1950); *Troupe v. Transit Company*, 234 Fed. 2d 253 (2nd Cir., 1956); *Doucette v. Vincent*, 194 Fed. 2d 834 (1st Cir., 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company v. Van Hoosar*, 72 Fed. 2d 903 (9th Cir., 1934); *Strachman v. Palmer*, 177 Fed. 2d 427 (1st Cir., 1949); *Chicago Great Western Railway Co. v. Chicago, Burlington and Quincy Railway Co.*, 193 Fed. 2d 975 (8th Cir., 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion v. Connell*, 236 Fed. 2d 447 (9th Cir., 1956); *Jung v. K & D Mining Co.*, 260 Fed. 2d 607 (7th Cir., 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *Southside Theatres v. United West Coast Theatres Corporation*, 178 Fed. 2d 648 (9th Cir., 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 Fed. 2d 529 (1st Cir., 1949); *Hogue v. National Automatic Parts Association*, 87 Fed. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. v. Welduction Corporation*, 151 Fed. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state or common law in such cases as *Gulley v. First National Bank of Meridian*, 81 Fed. 2d 502 (5th Cir., 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company v. Owensboro Milling Company*, 222 Fed. 2d 109 (6th Cir., 1955).

Applicable to this case, as in the *Osborne* case, is the quotation from *Errion v. Connell*, 236 Fed. 2d 447:

> "It is alleged in the complaint in our case, and the trial court found, a *single cause of action* involving a *single fraudulent scheme* to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has

> no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Here, as in the *Osborne* case, the petitioner claims a conflict with the opinions in *United Mine Workers of America v. Patton*, 4th Cir., 211 Fed. 2d 742, and *Apex Hosiery Co. v. Leader*, 310 U. S. 469, and *Hunt v. Crumboch*, 325 U. S. 821.

It is pointed out in respondent's brief opposing the Osborne petition that the Court of Appeals made no reference to the doctrine of pendent jurisdiction in the *Patton* case, where the wrongs alleged were wholly "encompassed in the remedy afforded by the Federal Statute." In the *Apex* and *Crumboch* cases the doctrine was not asserted by plaintiff, nor did the facts alleged in the complaint present even colorable federal claims, a prerequisite to any exercise of pendent jurisdiction.

Question No. 4.

Concurrent Findings of the Two Courts Below That Petitioner Was Liable for Damages to Respondents' Property Is Supported by Evidence.

Petitioner argues that the findings of the lower courts that it was liable for damages to respondents' property raises a problem which is "predominately one of law" and that such findings conflict with the decisions in the cases of *U. S. v. White*, 322 U. S. 694, *International Ladies Garment Workers Union v. NLRB*, 237 F. 2d 545, and *NLRB v. Tex-O-Kan Flour Mills, Inc.*, 222 F. 2d 433. The *White* case was decided in 1944 and involved a criminal contempt proceed-

ing; the *Ladies Garment Workers* case involved a petition to review and set aside an order of the National Labor Relations Board and dealt with the rights of individual strikers to re-employment; the *Tex-O-Kan Flour Mills* case was decided in 1941 and involved a cease and desist order sought by the National Labor Relations Board and an order to compel reinstatement of employees. To say that either of these cases conflict with the decision in respondents' cases requires a definition or concept of the term "conflict" beyond its recognized meaning.

The findings of the lower courts on this point do not raise, as posed, a question of law, but raise only a question of fact. The petitioner is, of course, familiar with the "seasoned and wise rule of this Court" making concurrent findings of fact of two courts below final in the absence of a very obvious and exceptional showing of error. *Comstock v. Institutional Investors*, 335 U. S. 211, 214, *Graver Manufacturing Co. v. Linde Co.*, 336 U. S. 271, 275. The real question here is whether or not the petitioner has demonstrated that these concurrent findings of fact of the two courts below constitute error of an obvious and exceptional character. A determination of this question requires a review of the evidence and the inferences to be drawn from it.

As an introduction to the question of the responsibility of the petitioner, these unchallenged findings of the District Court are of importance (R. 108, 110, 118):

> "(5) In February, 1959, the agents and representatives of the UMW began an intensive campaign in southeastern Kentucky and northeastern Tennessee to organize the field.
>
> "(6) The task of persuading mine operators in the Jellico, Tennessee, area to sign the amended wage agreement was delegated by the Union principally to

William Prater and Ed Daniel, district representatives of the defendant Union, in accordance with previous practice.

"(7) Prater and Daniel, as agents of the defendant Union, and in prosecution of an organizing campaign in the Union's behalf, enlisted a number of lieutenants to assist in the organizational activities.

* * *

"(13) During this period, Prater and Daniel and members of the local unions from nearby areas and various pensioners of the defendant assembled day and night in large crowds on the streets of Jellico and from time to time drove in motorcades consisting of numerous automobiles around the mining areas with placards indicating their purpose to advertise their 'No Contract, No Work' tradition and campaign.

* * *

"(31) Daniel and Prater were furthering the interest of the defendant in their organizational activities. The defendant advanced large sums of money to support these organizational activities including two and one-half million dollars during the year 1959. The Union activities in the area induced and encouraged the employees of the employers to engage in a concerted refusal to mine and haul coal."

Copies of the new wage agreement, containing the "protective wage" clause, were furnished to Prater and Daniel by the district office, and they had no authority to make any changes or alterations in the contract which they were undertaking to persuade the coal operators to sign (R. 875). Prater made arrangements for meals to be furnished to his crew of lieutenants at certain restaurants in Whitley County, Kentucky, and in Campbell County, Tennessee, and arranged the payment of gasoline and automobile supplies furnished to the owners and operators of automobiles used in carrying out the activities (R. 504-509,

876-879). Prater bought four pistols from one of these restaurant operators, Malcom Jackson (R. 509). On several of the occasions when Prater and Daniel and their assistants were threatening and intimidating the employees of the primary and secondary employers there was evidence that members of the union group were armed (R. 344-346, 404, 419, 420, 426, 448, 449, 531, 539, 668, 669). The evidence showed a pattern of the use of explosives to damage and destroy the property of employers and employees, who were attempting to work in the Jellico area (R. 227, 617-621, 632-634, 644, 680, 681, 742-744). Prater and Daniel made several statements which indicated their planned mode of operation in enforcing the union objectives. Prater advised William G. Gilchrist, Jr., that "he had been sent there with instructions to shut everybody down that didn't sign the contract, and he hoped he wouldn't have to use any violence to do it, but he intended to shut us down at any cost if we didn't sign the contract" (R. 208). Prater told Robert Randolph that if S & R did not sign the contract "we will shut you down." When Randolph questioned his right to do so, Prater answered, "I don't need any legal right. I take my orders from the Washington office." When Randolph asked Prater how he intended to stop them, he said "By any means that is required" (R. 730). On another occasion when Randolph was at the partnership tipple Daniel told him that "there wasn't going to be any more goddamned coal put over that ramp" (R. 733, 734).

Meetings were held between union officials and representatives of the coal operators in Washington, D. C., and in Frankfort, Kentucky, with regard to the problems which had developed. At these meetings high officers in the union were quoted as saying that the way to cut down further trouble was for the operators to sign the contract (R. 388,

390, 472, 474). On April 30, 1959, at the request of the National Labor Relations Board, the District Court for the Eastern District of Kentucky issued a temporary restraining order restraining the union from further acts of violence and disorder. At a subsequent hearing the union consented that the restraining order be continued in effect indefinitely (R. 219, 220).

Various members of the group of lieutenants of Prater and Daniel were implicated in incidents of violence to persons and property. Bob Bailey was identified as one of a group who ambushed and shot into the truck of George Lindsay, crusher operator employed by G & R (R. 461). Walter Fuson, crusher employee of G & R, was assaulted, beaten and knocked unconscious by George Smith, Jr., using a pair of brass knucks (R. 483). Jack Lohr, one of Prater's lieutenants (R. 60) who "helped me out quite a bit" (R. 879), was identified as being present when the partnership tipple was dynamited under circumstances which implicated his participation in that episode (R. 492, 493, 499-503). Shortly after the auger of S & R was dynamited Hubert Bailey, Herman Justice, Johnny Cox, Esom Bryant and Clarence Bryant wound up in jail in Kentucky charged with public drunkenness and carrying concealed deadly weapons; the Bryants, while in jail, became implicated in participation in this dynamiting episode (R. 798, 799, 804, 805). A day or two after the dynamiting Hubert Bailey and Herman Justice were overheard bragging about how "they could make a damn big boom" (R. 572, 574). Not one of these lieutenants of Prater and Daniel appeared as a witness upon the trial of these cases, and the testimony concerning them, and the inferences to be drawn therefrom, stands without contradiction in the record.

At the time the tipples of Gilchrist & Sons were blasted shortly after midnight, Prater was in bed in his hotel room, three or four blocks away. The first blast shook him up, but he did not get out of bed. At the second blast, he did jump out of bed (R. 890, 891). Then he did a very strange thing. The union had been accused of all manner of bad behavior—falsely, according to Prater. The union had been enjoined, on a representation to the court that it was violating the laws. Prater was supposedly struggling to preserve the union's good name. Nevertheless, when two explosions shattered the main street of Jellico in the middle of the night, Prater merely crawled back into bed and went to sleep. The next morning, when he went out to get his breakfast and observed the devastation, he did not even bother to ask anyone what had happened, or who was responsible (R. 891). He did, however, exhibit enough interest in the event to try to secure the release from custody of the men who were accused of doing the job (R. 686).

Because respondents were unable to produce any eye witnesses to the events, and had no specific confession from the petitioner as to delegation of authority, it is now argued that the two lower courts committed obvious and exceptional error in holding the petitioner liable for the destruction of the partnership tipples and the auger of S & R. Apparently the petitioner takes the position that responsibility for the destruction of the tipples and auger cannot be fastened on it by circumstantial evidence.

It is a novel proposition to assert that circumstantial evidence cannot be the basis of the findings of liability by the lower courts in these cases as in any other case. In the case of *United Mine Workers of America v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, the District Court held the union responsible for blowing

up railroad tracks serving the mine, which determination was based upon circumstantial evidence. In *Rogers v. Missouri P. R. Co.*, 353 U. S. 500, 508, the Court made this observation about a responsibility for damages being fixed by circumstantial evidence:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

To this is appended a footnote, referring to *The Robert Edwards* (U. S.), 6 Wheat. 187, 190, 5 L. Ed. 238, to the effect that:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

In *Gearhardt v. American Reinforced Paper Co.*, 7th Cir., 244 F. 2d 920, the Court of Appeals awarded damages based upon liability established solely by circumstantial evidence, and in this regard the court quoted other opinions with approval, as follows:

> "Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient, either alone or in combination with direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inference drawn must be reasonable. But there is no requirement that the circumstances to justify the inferences sought, negative every other positive or possible conclusion. * * * Inferences made from probative facts do not constitute legal speculations if they can be said to be probabilities by the test of common judgment."

In *Schauffler v. Highway Truck Drivers & Helpers*, 3 Cir., 230 F. 2d 7, 10, a secondary boycott case, the court stated:

> "On the other hand, agency may be established by other means than a direct statement from an alleged employer that someone is his agent, or the showing of a written power of attorney on the part of a principal to have another act for him. It can, of course, be proved by circumstantial evidence, as can any other proposition."

In considering the reasonable inferences which may be drawn from the circumstantial evidence in this case, reference is again made to the fact that the implicated union lieutenants of Prater and Daniel did not appear as witnesses in these cases. It is the general rule that, in such a situation, a party is presumed to neglect the production of a friendly witness because that witness, if produced, would give testimony detrimental to the party. The rule is thus expressed in Kentucky in the case of *Huber & Huber Motor Express v. Martin's Admr.*, 265 Ky. 228, 233, 96 S. W. 2d 595:

> "It is the prevailing rule that where it lies within the power of a litigant to produce a witness or any evidence on an issue and he fails to do so, creates the presumption that the testimony of the witness or other evidence, if produced, would have been unfavorable to such litigant."

The case of *Vigderman v. U. S.*, E. D. Pa., 175 F. Supp. 802, was an action to recover under the Federal Tort Claims Act for the death of an employee of a private corporation assigned to perform services for the United States Air Force. It involved an airplane crash, and turned upon the position of the landing gear and flaps at the time a turn was executed. The government investigated the ac-

cident, and two eye witnesses (presumably Air Force personnel) were in a position to observe the airplane at the time of the turn, but they were not produced as witnesses. On this point, the court observed (p. 809):

> "Particularly applicable to this situation is the rule that where a party (here, the United States) fails to produce witnesses within its control who presumably are best informed on the subject of investigation, especially if their relations with such party are not hostile but are friendly, so that their bias, if any, would be in such party's favor, it may be inferred that the information that would be provided would be unfavorable to such party."

Applying this rule, the court inferred that the landing gear and flaps were negligently extended at the time the turn was made, and based an award to the estate of the deceased employee on this act of negligence.

In conclusion on this point, attention is directed to the opinion of the Court of Appeals where, after a thorough consideration of these cases, the court stated (Appendix to petition, 7a):

> "We are satisfied that the District Judge correctly applied the rules of law with respect to the issues of liability and damage."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 213

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE, Trustee for ROBERT A. GILCHRIST, a minor, Partners, d/b/a GILCHRIST & SONS; and G & R COAL CO., INC.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

SNYDER AND RANDOLPH, INC.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 213

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE, Trustee for ROBERT A. GILCHRIST, a minor, Partners, d/b/a GILCHRIST & SONS; and G & R COAL CO., INC.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

SNYDER AND RANDOLPH, INC.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

Petitioner does not reply seriatim, to respondents' arguments in opposition to its petition since petitioner believes that answers to respondents' arguments are

contained in the petition. Petitioner further believes, however, that a reply to the following matters will be helpful to the Court:

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER ONE

1. Response to Respondents' Contention That the Issue Raised in Question Number One Was Not Raised in the Courts Below.

In Question Number One in its Petition for Writ of Certiorari and in its discussion thereof, UMW urged as a reason for granting the writ that the union activity involved in this case was primary and not secondary within the contemplation of Section 303 of the Labor-Management Relations Act, 1947 (29 USC Sec. 187). UMW asserted, as the basis for its contention, that any inducements which resulted in a refusal of contract truckers to haul coal for respondents occurred at the entrance to one of the mines involved and at the entrance to the tipple operated by one of the producing companies, the respondent G & R, and used by both producing companies, the respondents G & R and S & R.

Respondents, in their brief on Question Number One, erroneously state that this "is the first time this argument has been presented in these cases" (Respondents' Brief, Page 8).

The issues in the case were spelled out by the District Court in a pre-trial order. The first three issues stated therein are as follows (R. 49):

> "1. Did the defendant induce or encourage the employees of an employer doing business with the plaintiffs, or any of them, to concerted action?
>
> "2. If such inducement or encouragement is shown to have occurred, was an object thereof an

object prescribed by the Labor-Management Relations Act?

"3. If such inducement or encouragement of concerted action is shown to have occurred, did it take place at places other than the premises occupied by the plaintiffs?"

Each of these three issues supports the issue presented in Question Number One. The third issue is precisely to the point.

In the Court of Appeals, UMW specifically urged in its Question Number Two in that Court, the absence of a Section 303 violation on the ground that the truckers involved (who, as stated above, hauled coal from the respondents' mines to a common tipple and who thus performed work at common places of business with respondents as a normal part of respondents' operations) were not neutrals. The factual analysis to the argument contained repeated references to union inducements of truckers at the entrance to one of the mines and the entrance to the tipple. Though no precise reference was made in that argument to the fact that such inducements occurred only at primary premises, we consider, particularly in light of the admitted fact that such truckers performed the substantial part of this work on premises occupied and or used in common with the primary employers (G & R and S & R), that the question posed by Question Number One was fully embraced therein.

UMW also, in its Question Number Six in the Court of Appeals and in its prayer for relief sought thereunder, contended that the evidence was not sufficient to show that it "unlawfully interfered with and destroyed plaintiffs' business . . . in violation of Section

303 of the Labor-Management Relations Act and the common law of . . . Tennessee and Kentucky;" and here with particular reference to the operating company, S & R, the absence of evidence of secondary inducement was urged. Though this statement was made in connection with the observation that UMW sought to organize contract truckers[1] as well as the mining and tipple employees of the operating companies, we conceive that that argument fairly permits present argument of the question raised by Question Number One.

The emphasis which petitioner places on the issue raised by Question Number One, of course, stems from this Court's decision in *Local 761, Int'l. Union of Radio and Machine Workers* v. *NLRB*, U.S. , 6 L. ed. 2d 592, which was announced after the Court of Appeals' decision in the instant case. We submit that the *Machine Workers* decision is plainly inconsistent with the reasoning expressed in the immediate precedent for the instant case *UMWA* v. *Osborne Mining Co.* (CA 6, 1960), 279 F. 2d 716, cert. denied 364 U.S. 881, in which the Court of Appeals found no significance, under Section 303, in the fact that union activity occurred at a primary employer's premises. The explicit reliance on the *Osborne* decision by both the District Court and the Court of Appeals in the instant case (R. 124, 125; Appendix to Petition 7a) confirms that the disposition of the instant case was based on the reasoning expressed therein. Accordingly, petitioner submits that review of the issue posed by Question Number One is clearly warranted and proper.

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[1] The solicitation of respondents' truckers for union membership is shown in the record (R 829, 895, 902, 918-919).

2. The Union Activities Upon Which the Section 303 Violation Was Based Occurred at the Mine and Tipple Entrances.

On pages 11 and 12 of respondents' brief numerous citations to the record are made in an effort to show that contract trucks hauling coal for respondents were induced, at places removed from the primary employers' premises, to refuse to work for respondents G & R and S & R.

These references, however, only serve to establish petitioner's insistence.

At one point (respondents' brief, page 11) respondents say that petitioner "intercepted" contract truckers "on the public highway about two miles distant from the G & R mine," giving record citations R. 370 and 380. Respondents overlook the fact that this location was entrance of the private road leading from the public road to the mine. The witnesses whose testimony respondents cite is positive (R. 369, 379).

Similarly respondents say that S & R truckers were "intercepted . . . at a point approximately six miles from the S & R mine," citing R. 586, 666-669. Respondents fail to point out, though the testimony cited shows, that these incidents occurred at the entrance of the tipple operated by G & R, from whom petitioner sought a contract. Respondents apparently contend that primary activity at the G & R tipple became secondary for the simple reason that someone other than a G & R employee came there to engage in business and was persuaded not to do so by reason of that activity.

The fact that coal miners were seen on the streets of the mining town in which G & R's tipple was located and that motorcades of union men driving on public

roads advertised their dispute in which 3,700 men were involved are relied upon by respondent to show a "secondary boycott." If such facts are sufficient to establish a violation of Section 303 it is manifest that it will be difficult, if not impossible, for union men working at widely separated establishments to strike in sizeable numbers without running afoul of a prohibition which Congress "narrowly conceived." *United Brotherhood of Carpenters* v. *NLRB,* 357 U.S. 93.

On page 18 of respondents' brief, respondents assert that certain record citations (R. 208, 214, 221, 287, 288, 304) establish that UMW's objective was to cause S & R to cease doing business with Gilchrist and Sons. We submit that the record totally fails to establish such an objective. The plain objective of UMW was to obtain collective bargaining agreements from G & R and S & R. The fact is that S & R sold its coal to Gilchrist and Sons and delivered its coal to a tipple *owned* by Gilchrist and Sons and *operated* by G & R. Respondents seem to argue that union activity at the G & R tipple was secondary to G & R because it involved S & R and that it was secondary to S & R because it caused S & R truckers not to unload coal at the G & R tipple. Respondents then argue, on the basis of the record pages cited above, that union activity at G & R was secondary to Gilchrist and Sons because Gilchrist and Sons would have purchased S & R coal upon its delivery to G & R.

To attribute such a multitude of objectives to union activity at the sole entrance to the premises of an employer from whom the union seeks a collective bargaining agreement is to destroy the practical aspects of the Congressionally intended and judicially recognized limitations on the proscription of Section 303, yet it is

upon this construction of Section 303 that the judgment against petitioner is based.

The decision in the instant case demonstrates the necessity for further clarification of what does and what does not violate this important section of the Labor-Management Relations Act.

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER TWO

Notwithstanding Its Relationship to G & R. Gilchrist and Sons Was Neither a Primary Employer Nor a Neutral Through Which Pressure Was Brought to Bear on a Primary Employer. It Is, Therefore, Not Entitled to Maintain an Action Under Section 303.

Respondents detail in their brief the various ways in which Gilchrist and Sons had "integrated" its operation with that of G & R, such as by furnishing the land on which G & R operated, the equipment which G & R used and certain services which facilitated the latter's operation.

This does not obscure the fact that Gilchrist and Sons did not perform those functions which lead to G & R's role of a primary employer in a labor dispute. Petitioner therefore urges that if its activities were secondary as to G & R (one of the producing companies from which it sought an agreement) they were not secondary to Gilchrist and Sons, and that the damages Gilchrist and Sons sustained were necessarily not immediate but were in consequence of its relationship to a primary employer. As such, petitioner insists its damages are not actionable under Section 303.

Respondents take issue with our contention that Gilchrist and Sons' role is similar to that of Love and Amos in *UMWA* v. *Love and Amos Coal Company* (CA 6), 279 F. 2d 716, saying that Gilchrist and Sons

was far more involved in the controversy than was Love and Amos, a coal sales agent. Petitioner has never insisted that the relationship was identical. Our insistence is that they occupied roles not materially distinguishable in that neither was the employer of employees involved in the dispute and in that neither was primarily or secondarily involved in the dispute.

It is most assuredly clear that Gilchrist and Sons' relationship to S & R from whom it purchased coal for sale and to whom it leased no equipment, approaches almost to the letter the Love and Amos role, yet losses sustained by reason of the inability of S & R to mine coal was part of the "secondary boycott" for which Gilchrist and Sons recovered.

But whether considered in light of its relationship to G & R or to S & R, Gilchrist and Sons was at least one step beyond the protection intended by Congress in enacting Section 303.

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER FOUR

Petitioner's Liability for the Destruction of Respondent's Property Was Not Predicated on Circumstantial Evidence But on the Erroneous Application of a Rule Permitting Adjudication of Vicarious Liability for Unauthorized Acts.

Respondents insist that the question of whether UMW was responsible for the destruction of the G & R tipple and the S & R auger is one of fact on which the courts below have concurred. Respondents further insist that the conclusion of liability was properly reached on the basis of circumstantial evidence.

Respondents' position is not responsive. We do not ask this Court to review a question adjudicated on the basis of circumstantial evidence. The District Court *did not rely on circumstantial evidence* in concluding

that UMW was liable for the acts in question. To the contrary, the District Court's opinion (affirmed without discussion of the point by the Court of Appeals) was based upon the purported applicability of a rule expressed thusly in Section 915, Restatement of Torts, cited and relied upon by the District Court (R. 132):

> "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the harm resulted from an outside force, the risk of which was not increased by the defendant's act."

Application of this rule was not based upon circumstantial evidence. It was based on the fact, as found by the Court, that defendant in picket line activity tortiously induced respondents' employees to cease work. There is no evidence that UMW damaged any property or that it induced others to do so. The District Court simply translated picket line activities into a basis of liability for acts of an entirely different character. Defendant's picket line activities—during which not a man was harmed and no property of any kind was damaged—according to the District Court, "created among its members a spirit of lawlessness and animosity toward the operation of plaintiff's coal business, thereby creating a situation or climate in which the risk of harm to their properties was greatly increased (conclusion of Law 14, R. 132)". The record does not show that Petitioners created among its members a "spirit of lawlessness and animosity," nor does it show that such acts of violence were committed by its members. And in the same conclusion, citing the Restatement rule quoted above, the District Court then ruled thusly:

> "Its (defendant's) conduct was a substantial factor in causing the damage to the tipples of the

> plaintiff, Gilchrist and Sons, and to the auger of the plaintiff, Snyder and Randolph, Inc. The defendant is liable for this damage sustained by the plaintiffs from the interruption and destruction of their businesses *even though the result may have been contributed to by other forces and even though the acts of others not authorized by the defendant may have contributed to the result.*"

In an aspect of our industrial life in which intensity of feeling is judicially recognized as "difficult to prevent". *Republic Steel Corp.* v. *NLRB* (CA 3), 107 F. 2d 472, 479, and in an industry once noted for its use of the *agent provocateur,* the District Court employed, as a basis of liability, a rule of law never, as petitioner is advised, applied heretofore in a comparable context. Concurrence on the application of such a rule does not foreclose review, for clearly the issue is one in which an "issue of law (is) entwined." *Lustig* v. *U.S.*, 338 U.S. 74, 77.

The District Court's sweeping decree of outlawry, which would permit a union found errant in prior acts to exercise thereafter the federally guaranteed right to engage in concerted action only at the risk of being a guarantor, presents a question of first importance which has not been, but which should be, decided by this Court.

On page 36 of their brief, respondents state that certain individuals, arrested subsequent to one of the acts in question, "became implicated in participation in this dynamite explosion." Respondents neglected to state that the evidence to which it referred was not admitted as substantive evidence to any extent on the question of liability. It was admitted only on the question relative to damages and minimization of damages.

of why S & R "moved their operation" (District Court's memorandum, R. 97).

Respectfully submitted,

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